

Cleo-Symone Scott

- **Option 2:** Remove the disclaimer from the second page and place it on the third page directly above the signature line. Leave it in all-capitalized black lettering but put it in a bolded 14-point font with a border around the entirety of it. Lastly, place a box next to it for the buyer's signature.

CLEO-SYMONE SCOTT

1702 Wake Forest Dr.
Richmond, VA 23226
cleo.scott@richmond.edu
757-284-7494

WRITING SAMPLE

This brief was prepared for the first year required Legal Analysis & Writing course. We were asked to write a Memorandum in Support of Plaintiffs' Motion for Summary Judgment. I first analyzed whether a homeless shelter could be considered a dwelling for purposes of the Fair Housing Act. After concluding that it was a dwelling and that the defendant had violated the Fair Housing Act, I requested summary judgement on behalf of the Plaintiffs since there was no genuine issue of material fact.

STATEMENT OF FACTS

Defendant is an openly racist organization that operates the Our Place homeless shelter in Pittsburgh, PA. Compl. ¶ 8; Answer ¶ 8. Defendant admits to only offering shelter beds at Our Place to Caucasian Americans. Compl. ¶ 11; Answer ¶ 11. During the cold winter month of December, Our Place turned away two needy individuals because of their race and national origin. Compl. ¶¶ 14-15; Answer ¶¶ 14-15. On December 17, 2021, Our Place turned away Ileana Garcia because of her Mexican national origin. Compl. ¶ 14; Answer ¶ 14. Garcia, a female Mexican immigrant who has lawfully lived in the United States for 25 years, was told by the Our Place front desk attendant that, “Our Place is only for Americans.” Compl. ¶ 14; Answer ¶ 14. Three days later, Our Place turned away Marshall Jamison because of his race. Compl. ¶ 15; Answer ¶ 15. Jamison, an African American man, was told by the front desk attendant that he would not be admitted because there was “no room at the shelter for people like him.” Compl. ¶ 15; Answer ¶ 15.

After Ms. Garcia and Mr. Jamison were turned away from Our Place, they approached HOPE, a fair housing nonprofit organization that works to find safe, affordable housing for individuals in Pittsburgh. Compl. ¶ 17. HOPE then diverted scarce resources to help Ms. Garcia and Mr. Jamison find housing. Compl. ¶ 17. Unfortunately, these are not isolated incidents of discrimination. Compl. ¶ 13; Answer ¶ 13. Rather, the defendant specifically trains their volunteers to discriminate and blatantly tells them during training that Our Place is intended to serve only “white people born and raised in the U.S.A.” Compl. ¶ 13; Answer ¶ 13.

While the defendant discriminates in their admissions policies, they have adopted welcoming and permissive facility policies for their Caucasian American residents. Caucasian Americans are permitted to remain at Our Place for up to 42 days in any given twelve-month

period. Compl. ¶ 10(a); Answer ¶ 10(a). The shelter accommodates up to twenty residents at any given time and has ten bedrooms, each with two twin beds. Compl. ¶ 9; Answer ¶ 9. Residents are assured they will receive the same bed each night if they notify staff of their intention to remain there by 9:00 a.m. each preceding morning. Compl. ¶ 10(b); Answer ¶ 10(b). Residents may receive mail at the shelter. Compl. ¶ 10(j); Answer ¶ 10(j). Furthermore, residents are provided with a storage cabinet, located next to each twin bed, which they may use to store personal belongings during their stay. Compl. ¶ 10(d); Answer ¶ 10(d). Our Place also provides residents with a cork bulletin above each twin bed so that residents can personalize their space by posting photos. Compl. ¶ 10(c); Answer ¶ 10(c).

In addition, Our Place has adopted extremely permissive policies for its residents regarding exiting and entering the shelter. Compl. ¶ 10(h); Answer ¶ 10(h). Specifically, residents are given the freedom to enter and leave the shelter at will to visit with outside guests, get outside food, or for any other reason, without any time restrictions. Compl. ¶ 10(h); Answer ¶ 10(h). Further, residents are permitted to spend time in the shelter during the day if they agree to complete a rotating list of household chores. Compl. ¶ 10(i); Answer ¶ 10(i). Also, residents are invited to eat in a common dining room for dinner. Compl. ¶ 10(b); Answer ¶ 10(b). The food is provided and cooked by Our Place volunteers. Compl. ¶ 10(b); Answer ¶ 10(b).

On February 21, 2022, Plaintiffs filed their Complaint in this Court proving that the defendant has violated the FHA in their Our Place facility. On February 22, 2022, the Defendant filed its answer in which it conceded that it denied accommodations to Ms. Garcia and Mr. Jamison on the discriminatory basis of their national origin and race. Since the undisputed facts in the Defendant's answer show that Our Place is a dwelling, Plaintiffs now respectfully move for summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991). A party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying the aspects of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to demonstrate that there is in fact a genuine issue of material fact. *United States v. 107.9 Acre Parcel of Land in Warren Twp.*, 898 F.2d 396, 398 (3d Cir. 1990). The nonmoving party will only meet its burden of proof if it presents sufficient evidence from which a reasonable jury could return a verdict in the non-moving party’s favor. *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir. 2010). An issue is genuine “only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party and a factual dispute is material only if it might affect the outcome of the suit under governing law.” *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006).

ARGUMENT

I. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE UNDISPUTED FACTS SHOW THAT OUR PLACE IS A DWELLING FOR PURPOSES OF § 3604(a) OF THE FAIR HOUSING ACT

Summary judgment should be granted because the undisputed facts prove that Our Place is a dwelling for purposes of § 3604(a) of the FHA. Under the FHA, it is unlawful to, “make unavailable or deny, a dwelling to any person because of race...or national origin.” 42 U.S.C.A. § 3604(a) (2022). The FHA defines a dwelling as “any building, structure, or portion thereof which

is occupied as, or designed or intended for occupancy as, a residence by one or more families....”

Id. §3602(b). Moreover, the Housing and Urban Development implementing regulations have adopted the same statutory definition. *See* 24 CFR § 100.20 (2022).

Since the statutory definition of “dwelling” turns on the ambiguous word “residence,” the Third Circuit has developed a two-prong test to determine whether a facility is a dwelling. *See United States v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990). Under this test, a facility is a dwelling when “the facility is intended or designed for residents who ‘intend to remain in the [facility] for any significant period of time.’” *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township*, 455 F.3d 154, 158 (3d Cir. 2006) (quoting *Columbus Country Club*, 915 F.2d at 881). Second, a facility is a dwelling when those residents would “‘view [the facility] as a place to return to’ during that period.” *Id.*

Our Place satisfies both prongs of the two-prong dwelling test. First, Our Place’s maximum intended stay of 42 days shows that the facility is intended or designed for residents who intend to remain for a significant period of time. Second, Our Place’s welcoming and permissive facility policies allow Our Place’s residents to view the shelter as a place to return to. Thus, there is no genuine issue of material fact as to whether Our Place is a dwelling for purposes of § 3604(a).

A. Our Place’s maximum intended stay of 42 days shows that the facility is intended or designed for residents who intend to remain for a significant period of time.

Our Place satisfies the first prong of the Third Circuit’s two-prong dwelling test because the facility is intended or designed for residents who intend to remain for a significant amount of time. A facility is intended or designed for residents who intend to remain in the facility for a significant period of time whenever the maximum intended stay is longer than a “temporary sojourn or transient visit.” *Lakeside*, 455 F.3d at 157. Further, a temporary sojourn or transient visit is akin to a typical stay at a “motel or bed and breakfast.” *Id.* at 159. Our Place’s maximum

intended stay of 42 days is much longer than a typical stay at a motel or bed and breakfast and is thus longer than a temporary sojourn or transient visit. Accordingly, Our Place is intended or designed for residents who intend to remain in the facility for a significant period of time.

Our Place's maximum intended stay of 42 days is longer than the 30-day maximum intended stay that the Court found satisfied the first prong in *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township*, 455 F.3d 154, 159 (3d Cir. 2006). In *Lakeside*, the court held that a 30-day maximum intended stay is longer than a typical stay at a motel or bed and breakfast and is thus longer than a temporary sojourn or transient visit. *Id.* The court went on to explain that the facility's shorter 14.8-day average length of stay was also longer than a temporary sojourn or transient visit because 14.8 days is longer than a typical stay at a motel or bed and breakfast. *Id.* Our Place's 42-day maximum intended stay is longer than the 30-day maximum intended stay in *Lakeside*. *See id.* Further, Our Place's maximum intended stay is significantly longer than the 14.8-day average stay which was held to be longer than a temporary sojourn or transient visit. *See id.*

Our Place differs from *Smith* where this Court held the intended stay was insufficient to satisfy the first prong of the test. *Smith v. The Salvation Army*, No. CIV. 13-114-J, 2015 WL 5008261, at *1 (W.D. Pa. Aug. 20, 2015). For example, in *Smith*, the court held that the three-day maximum stay¹ was akin to a typical stay at a motel or bed and breakfast. Thus, the maximum length of stay in *Smith* was not longer than a temporary sojourn or transient visit. *Id.* While three-days was held to be akin to a typical stay at a motel or bed and breakfast, the maximum intended

¹ In dictum, the judge stated that, even if the Court were to use 30 days as the relevant time period, it still would likely not satisfy the first prong. *Smith*, 2015 WL 5008261, at *5. This is not law and contradicts the binding decision set forth in *Lakeside* that held 30 days was a significant period of time. *Lakeside*, 455 F.3d at 159. Our Place is much more like *Lakeside* because both facilities allow residents to return night after night. *See id.* Thus, the dictum in *Smith* should not impact our case. *See Smith*, 2015 WL 5008261, at *5.

stay at Our Place is 14 times longer than the *Smith* maximum stay and thus is intended or designed for residents who intend to remain in the facility for a significant period of time. *See id.*

In summary, the undisputed facts show that Our Place satisfies the first prong of the two-prong dwelling test. Our Place's 42-day maximum intended stay is longer than a temporary sojourn or transient visit. Thus, Our Place is intended or designed for occupants who intend to remain for a significant period of time.

B. Our Place's welcoming and permissive facility policies allow Our Place's residents to view the shelter as a place to return to.

Our Place satisfies the second prong of the Third Circuit's two-prong dwelling test because Our Place's residents view the facility as a place to return to. Residents view a facility as a place to return to whenever the facility's policies create a home-like environment for its residents. *See Lakeside*, 455 F.3d at 159-160; *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 419. A facility's policies create a home-like environment when residents: have a designated sleeping area; receive mail; can store belongings and medications; can personalize their designated area; have access to visitors; are able to come and go as they please; have the ability to stay at the facility during the day; and have the freedom to eat meals together at the facility. *See Lakeside*, 455 F.3d at 159-160 (designated sleeping area; receive mail; have ability to personalize their designated area; access to visitors; ability to come and go as they please; eat meals together); *Defiore*, 995 F. Supp. 2d at 419 (designated sleeping area; medication storage).

Our Place's policies allow the residents to treat the facility as a home. For example, residents are given their own bed in a room that they share with only one other person. Residents are assured they will receive the same bed each night if they notify staff of their intention to remain there by 9:00 a.m. each preceding morning. Residents may receive mail at the shelter. Furthermore, residents are provided with a storage cabinet, located next to each twin bed, which they may use to

store personal belongings during their stay. Our Place also provides residents with a cork bulletin above each twin bed so that residents can personalize their space by posting photos. Furthermore, residents are given the freedom to enter and leave the shelter at will to visit with outside guests or get outside food, without any time restrictions. Residents are permitted to spend time in the shelter during the day if they agree to complete a rotating list of household chores. Also, residents are invited to eat in a common dining room for dinner. The food is provided and cooked by Our Place volunteers.

Our Place's policies create an even more home-like environment than the legally sufficient policies in *Lakeside* and *Defiore*. See *Lakeside*, 455 F.3d at 159-160; *Defiore*, 995 F. Supp. 2d at 419. For instance, in *Lakeside*, residents would return to their rooms in the evening and receive mail at the facility. *Lakeside*, 455 F.3d at 159. Moreover, occupants were able to personalize their designated room or space by hanging pictures on their walls. *Id.* at 160. Also, occupants were able to have visitors in their rooms. Residents would also eat meals together, separated by gender. *Id.* at 159. *Lakeside* residents were not allowed off the grounds of the facility unsupervised. *Id.* Because of this restriction, the *Lakeside* facility barely satisfied prong two and only surpassed the test because they allowed visitors in the rooms. *Id.* At Our Place, residents can also return to their rooms in the evening, receive mail, personalize their space, and eat meals together. Further, Our Place's residents are less restricted than *Lakeside's* residents because they can come and go as they please. See *id.*

Additionally, Our Place's policies create a more home-like environment than the legally sufficient policies in *Defiore*. *Defiore*, 995 F. Supp. 2d at 419. In *Defiore*, the court held that a reasonable jury could find that the *Defiore* facility created a home-like environment for its residents, despite several restrictions. *Id.* In *Defiore*, occupants were able to return to their sleeping

areas in the evening and have their medication dispensed by the facility's staff. *Id.* Residents were not able to have individual rooms or personalize their space. *Id.* at 418. Further, residents were subjected to a highly regimented schedule where they were required to have group meetings and attend church service. *Id.* At Our Place, residents can also return to their sleeping areas in the evening. However, Our Place's residents are less restricted than the *Defiore* residents because they can come and go as they please, personalize their area, and are not required to attend meetings and services. *See id.*

Furthermore, all of Our Place's policies differ from the policies in *Smith* that were held to not create a home-like environment. *Smith*, 2015 WL 5008261, at *6. In *Smith*, guests were not guaranteed the same bed or room each night. The rooms included military, bunk bed type cots and six people had to share a room for the night. *Id.* The facility did not treat the guests as if they would necessarily be returning the next night. *Id.* Furthermore, guests at the *Smith* facility could not customize or personalize their room or bunk. *Id.* In *Smith*, guests were required to place all medicinal type products, except for daily doses, in the facility's office under lock and key. *Id.* Moreover, in *Smith*, the facility maintained a rigorous schedule and required guests to depart for most of the day and to take their belongings with them. *Id.* In contrast to the facility in *Smith*, Our Place's residents are given their own bed in a room that they share with only one other person. *See id.* Also, they are assured they will receive the same bed each night provided they notify staff of their intention to remain there by 9:00 a.m. each preceding morning. Our Place residents have a cork bulletin board above their beds that can be used to personalize their space by posting photos. Further, Our Place, residents have access to a cubby in their room to store any possessions for the duration of their stay. Moreover, Our Place residents are permitted to spend time in the facility during the day if they agree to complete a rotating list of house chores.

In sum, Our Place is a facility that residents view as a place to return to because the facility's policies allow them to create a home-like environment. Thus, Our Place would satisfy the second prong of the two-prong dwelling test.

CONCLUSION

The Plaintiff's Motion for Summary Judgment should be granted because the undisputed facts show that the defendant has violated § 3604(a) of the FHA. Defendant concedes that they have denied accommodations to plaintiffs Ms. Garcia and Mr. Jamison based on their national origin and race. Further, the undisputed facts show that Our Place is a dwelling because: (1) Our Place's maximum intended stay of 42 days shows that the facility is intended or designed for residents who intend to remain for a significant period of time; and (2) Our Place's welcoming and permissive facility policies allow Our Place's residents to view the shelter as a place to return to. Accordingly, the Plaintiffs respectfully request that this Court grant the Plaintiff's Motion for Summary Judgment as there is no genuine issue of fact as to the defendant's violation of the FHA.

Respectfully submitted,

By: Cleo Scott
STEVENS STEIN KIM, P.C.
Attorney for Plaintiffs
987 Centre Avenue
Pittsburgh, PA 15217
April 15, 2022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first class mail, postage prepaid, this 15th day of April 2022, to attorney for Defendant, Yvonne Jones, Jones & Fellstrom, P.C., 456 Grant Avenue, Pittsburgh, PA 15217.

Cleo Scott

Applicant Details

First Name **Warrington**
 Last Name **Sebree**
 Citizenship Status **U. S. Citizen**
 Email Address warrington.sebree@law.bison.howard.edu
 Address

Address
Street 4601 Connecticut Ave NW City Washington State/Territory District of Columbia Zip 20008 Country United States

Contact Phone Number **5017494301**

Applicant Education

BA/BS From **University of Arkansas-Fayetteville**
 Date of BA/BS **May 2019**
 JD/LLB From **Howard University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=50906&yr=2011
 Date of JD/LLB **May 11, 2024**
 Class Rank **10%**
 Law Review/Journal **Yes**
 Journal(s) **Howard Human and Civil Rights Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Organization**

Recommenders

Mordecai, Kacey
kморdecai@gmail.com

Holley, Danielle
dholley@law.howard.edu

Chisolm, Tuneen
tuneen.chisolm@howard.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Warrington E. Sebree

4601 Connecticut Ave NW, Washington, D.C. 20008

Warrington.Sebree@law.bison.howard.edu, (501) 749-4301

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a third-year student at Howard University School of Law, and I am applying to be your judicial law clerk for the 2024-25 term. Humbly, I am currently ranked in the top ten percent of my class and a student leader recognized by my peers and law school administrators. I want to clerk at the District Court because I seek to be a trial lawyer after graduation. I am interested in litigation as it provides the opportunity to use creativity to write persuasively about complex legal issues that shape legal precedent and public policy. You are an inspiration to me as you have overcome the systemic barriers against Black men in this country and the legal profession. As the legal profession is five percent Black with even less Black men, the opportunity to be mentored by a Black male federal judge is a once in a lifetime opportunity.

Clerking for the district court excites me because the court's vibrant and diverse docket will expose me to a variety of civil and criminal matters. This experience will be invaluable as I develop as an attorney and explore my passions within the law. I understand clerking for the district court requires heavy writing in a fast-paced environment. I seek this challenge because I know I will strengthen my research and writing skills as well as my general understanding of the law. As I want to litigate, clerking for the district court will provide insight on the life cycle of a case and will show me examples of good and bad lawyering. I love writing and I take pride in the revision process to intentionally select words to communicate clearly. Moreover, observing trials is an invaluable experience that will strengthen my oral advocacy.

My writing and research skills, academic experiences, and professional skills, will be valuable assets to your chambers. As an intern at the D.C. District Court for the Honorable Judge Tanya S. Chutkan, I drafted thorough and precise memoranda to my supervising law clerks and a bench opinion on a summary judgment motion. While a member of Howard's Fair Housing Clinic I drafted a motion for summary judgment, a jury demand, and memoranda on behalf of indigent tenants. As a staff editor on Howard's Law Review, I made technical citation and substantive edits for publication submissions, and I wrote my note about rap lyrics at trial and the First Amendment. Prior to law school, I further honed my research and writing skills and my ability to think through complex problems while completing my Master's thesis entitled *Racialized Reality: Crime News and Racial Stereotype Framing*. In my last year of law school, I anticipate taking advanced civil procedure, administrative law, criminal procedure, and commercial law.

My diverse set of experiences advanced my confidence and competency as a versatile problem solver while constantly remembering that I am always learning. Included are my resume, writing sample, and transcripts. My letters of recommendation from Dean Danielle R. Holley, Professor Tuneen Chisolm, and Professor Kacey Mordecai will be sent separately. I welcome the opportunity to interview with you and look forward to hearing from you soon.

Thank you very much for considering my application.

Sincerely,



Warrington Sebree

Warrington Sebree

4601 Connecticut Ave NW, Washington, D.C. 20008
warrington.sebree@law.bison.howard.edu, (501) 749-4301

EDUCATION

Howard University School of Law, Washington, D.C.

Expected May 2024

Juris Doctor Candidate

- GPA: 90.65/100 (Top 10%)
- Co-Curricular: *Human & Civil Rights Law Review* (Senior Articles Editor); *Henry Ramsey Dean's Fellow*
- Honors: Federal Clerkship Development Program Scholar, National Bar Institute Scholar, J.L. Greene Scholar, Lexis+ Proficiency Certified
- Activities: The Appellate Project, Student Bar Association Representative, Gospel Choir, Admissions Ambassador, Orientation Leader

University of Arkansas, Fayetteville, AR

Master of Arts, Political Science and African & African-American Studies

May 2021

- GPA: 4.0
- Publications: *Racialized Reality: Crime News and Racial Stereotype Framing*; *Navigating an Anti-Black Campus Climate: #black@pwi*
- Activities: Black Graduate Student Association (President 2020-21)

Bachelor of Arts, Political Science

May 2019

- Honors: Phi Beta Kappa, Merit Scholarship

EXPERIENCE

Bredhoff & Kaiser PLLC, Washington, D.C.

Summer Associate

June 2023 – Present

- Working on labor and employment litigation matters representing labor unions.

Howard University School of Law, Washington, D.C.

Hiring Committee; Student Representative

Jan. 2023 – Present

- Sitting, by nomination, on the hiring committee for the Dean of the law school and two professors.

Howard University School of Law Fair Housing Clinic, Washington, D.C.

Student Attorney

Aug. 2022 – May 2023

- Represented seven (7) clients in their housing-related cases and drafted a motion for summary judgment, motion to reinstate a jury demand, and appeared before the Superior Court for status hearings.

U.S. District Court for the District of Columbia, Washington, D.C.

Intern to the Hon. Judge Tanya S. Chutkan

May 2022 – Aug. 2022

- Conducted legal research and drafted memoranda concerning civil and criminal matters pending before the court.

University of Arkansas Political Science Department, Fayetteville, AR

Graduate Student

Aug. 2019 – May 2021

- Designed a research experiment to test how mass media perpetuates socio-cultural narratives.

COMMUNITY SERVICE

Arkansas American Legion Boys State, Conway, AR

May 2015 – Present

Senior Counselor; Staff Training Committee Chair

- Supervised 50-60 high school juniors and staff for a week-long camp on leadership and civic engagement.

INTERESTS: Percussionist, Basketball, Spoken word, and Arkansas Razorback sports.

Howard University
Washington, DC 20039

Student No:@03044008

Date Issued:10-JUN-2023 OFFICIAL

Record of : Warrington E Sebree

Current Name:Warrington E Sebree

2224 Howard St.
Little Rock, AR 72202

Issued To : WARRINGTON SEBREE

Course Level : Law

Current Program

Degree : Juris Doctor
Program : Juris Doctor
College : School of Law
Campus : West/Law

Subj	No.	C	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:

Fall 2021

School of Law
Law
First-Time Professional

LAW	507	M	Leg. Reg.	3.00	87	261.00
LAW	617	M	Torts	4.00	84	336.00
LAW	619	M	Civil Procedure I	4.00	82	328.00

Earned Hrs	GPA-Hrs	QPts	GPA
11.00	11.00	925.00	84.09

Spring 2022

School of Law
Law
Continuing

LAW	612	M	Constitutional Law I	3.00	85	255.00
LAW	613	W	Legal Reasoning Research Write	4.00	88	352.00
LAW	614	W	PROPERTY	4.00	88	352.00
LAW	615	M	Contracts	5.00	85	425.00
LAW	616	W	Criminal Law	3.00	89	267.00

Earned Hrs	GPA-Hrs	QPts	GPA
19.00	19.00	1651.00	86.89

Fall 2022

School of Law
Law
Continuing

LAW	621	M	Constitutional Law II	3.00	95	285.00
LAW	687	M	Professional Responsibility	3.00	89	267.00
LAW	718	M	Fair Housing Clinic I Exp	6.00	97	582.00
LAW	823	M	Private Equity: Hedge Funds	3.00	95	285.00

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	1419.00	94.60

Spring 2023

School of Law
Law
Continuing

LAW	629	W	Evidence	4.00	98	392.00
LAW	654	W	Legal Writing II	2.00	91	182.00
LAW	698	W	CD: Supreme Ct Jurisprudence	3.00	96	288.00
LAW	718	M	Fair Housing Clinic Exp.	6.00	97	582.00

Subj	No.	C	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	1444.00	96.27

Good Standing

Fall 2021

LAW	613	M	Legal Reasoning Research Write	0.00	In Prog	Course
LAW	615	M	Contracts	0.00	In Prog	Course

Fall 2022

LAW	817	M	HHCR Law Review Editors	0.00	In Prog	Course
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Spring 2023

LAW	817	M	HHCR Law Review 2L	0.00	In Prog	Course
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Fall 2023

LAW	525	M	Advanced Civil Procedure	3.00	In Prog	Course
LAW	642	M	Criminal Procedure I	3.00	In Prog	Course
LAW	647	M	Family Law	3.00	In Prog	Course
LAW	769	M	CD: Business Organizations	3.00	In Prog	Course
LAW	824	M	Law Comm: Civ. Rights Lit. Exp	2.00	In Prog	Course

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
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TOTAL INSTITUTION	60.00	60.00	5439.00	90.65
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TOTAL TRANSFER	0.00	0.00	0.00	0.00
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OVERALL	60.00	60.00	5439.00	90.65
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-----END OF TRANSCRIPT-----

Unofficial

Page 1 of 5

Unofficial Copy

Name: Warrington Sebree
Student ID: 010723118

Institution Info: The University of Arkansas
Print Date: 2021-02-19

Beginning of Undergraduate Record
Fa 2015

Walton College of Business
Undeclared Undergraduate(WCOB) Major
Pre-Business (Undeclared) Preparation

Term Honor: Chancellor's and Dean's List

Course	Description	Attempted	Grade	Points
ENGL 1013	COMPOSITION I	3.00	A	12.000
FREN 1003	ELEMENTARY FRENCH I	3.00	A	12.000
MATH 1313	QUANTITATIVE REASONING	3.00	A	12.000
MUEN 1441	MARCHING BAND I	1.00	A	4.000
MUTH 1003	BASIC MUSICIANSHIP	3.00	A	12.000
UNIV 1001	UNIVERSITY PERSPECTIVES	1.00	A	4.000

Term GPA	4.000	Term Totals	14.00	14.00	56.000
Cum GPA	4.000	Cum Totals	14.00	14.00	56.000

Good Standing

Sp 2016

Fulbright Col of Arts & Sci
Political Science Major

Term Honor: Dean's List

Course	Description	Attempted	Grade	Points
CHEM 1051L	CHEM IN THE MODERN WORLD LAB	1.00	A	4.000
CHEM 1053	CHEM IN THE MODERN WORLD	3.00	A	12.000
ENGL 1023	COMPOSITION II	3.00	A	12.000
FREN 1013	ELEMENTARY FRENCH II	3.00	B	9.000
MUEN 1461	WIND SYMPHONY I	1.00	A	4.000
MUEN 1481	CAMPUS BAND I	1.00	A	4.000
PLSC 2003	AMERICAN NATIONAL GOVT	3.00	A	12.000

Transfer Credit from Arkansas Tech University

Applied Toward Fulbright Col of Arts & Sci Program

Course	Description	Earned	Grade	Term
MATH 1203	COLLEGE ALGEBRA	3.00	A	SPR 2015

Term GPA	3.800	Term Totals	15.00	15.00	57.000
Cum GPA	3.897	Cum Totals	29.00	32.00	113.000

Good Standing

Fa 2016

Fulbright Col of Arts & Sci
Political Science Major

Term Honor: Chancellor's and Dean's List

Course	Description	Attempted	Grade	Points
ANTH 1023	INTRO TO CULTURAL ANTHROPOLOGY	3.00	A	12.000
FREN 2003	INTERMEDIATE FRENCH I	3.00	A	12.000
MLIT 1003	MUSIC LECTURE	3.00	A	12.000
PHYS 1021L	PHYSICS & HUMAN AFFAIRS LAB	1.00	A	4.000
PHYS 1023	PHYSICS & HUMAN AFFAIRS	3.00	A	12.000
PLSC 2013	INTRO TO COMPARATIVE POLITICS	3.00	A	12.000

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Name: Warrington Sebree
Student ID: 010723118

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
Term GPA	4.000	Term Totals	16.00	16.00	64.000
Cum GPA	3.933	Cum Totals	45.00	48.00	177.000

Good Standing

Sp 2017

Fulbright Col of Arts & Sci
Political Science Major

Course	Description	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
AAST 1003	AFRICAN AMERICAN STUDIES	3.00	A	12.000
PLSC 3103	PUBLIC ADMINISTRATION	3.00	B	9.000
PLSC 4273	POLITICAL PSYCHOLOGY	3.00	A	12.000
PLSC 4593	ISLAM AND POLITICS	3.00	B	9.000
SOCI 3193	RACE, CLASS, AND GENDER	3.00	B	9.000

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
Term GPA	3.400	Term Totals	15.00	15.00	51.000
Cum GPA	3.842	Cum Totals	76.00	79.00	292.000

Term Honor: Chancellor's and Dean's List

Good Standing

Sp 2018

Fulbright Col of Arts & Sci
Political Science Major

Course	Description	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
FREN 2013	INTERMEDIATE FRENCH II	3.00	A	12.000
MUEN 2481	CAMPUS BAND II	1.00	A	4.000
PHIL 2203	LOGIC	3.00	A	12.000
PLSC 2813	INTRO INTERNATL RELATIONS	3.00	A	12.000
PLSC 3153	PUBLIC POLICY	3.00	A	12.000
SOCI 2013	GENERAL SOCIOLOGY	3.00	A	12.000

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
Term GPA	4.000	Term Totals	16.00	16.00	64.000
Cum GPA	3.951	Cum Totals	61.00	64.00	241.000

Good Standing

Fa 2017

Fulbright Col of Arts & Sci
Political Science Major

Course	Description	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
AAST 4153	RACE AND SOCIETY	3.00	A	12.000
CMJS 2043	CRIMINAL LAW & SOCIETY	3.00	A	12.000
JOUR 1023	MEDIA AND SOCIETY	3.00	A	12.000
MUEN 3481	CAMPUS BAND III	1.00	A	4.000
PLSC 3223	AR POLITICS & THE NATION	3.00	B	9.000
PLSC 3603	SCOPE/MTHDS OF POLITICAL SCI	3.00	A	12.000

Term Honor: Dean's List

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
Term GPA	3.813	Term Totals	16.00	16.00	61.000
Cum GPA	3.837	Cum Totals	92.00	95.00	353.000

Unofficial

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Unofficial Copy

Name: Warrington Sebree
Student ID: 010723118

Good Standing

Fa 2018

Fulbright Col of Arts & Sci
Political Science Major
African and African American Studies Minor
Legal Studies Minor

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
<u>Term GPA</u>	<u>4.000</u>	<u>Term Totals</u>	<u>10.00</u>	<u>10.00</u>	<u>40.000</u>
<u>Cum GPA</u>	<u>3.847</u>	<u>Cum Totals</u>	<u>118.00</u>	<u>121.00</u>	<u>454.000</u>

Good Standing

Undergraduate Career Totals

<u>Cum GPA:</u>	<u>3.847</u>	<u>Cum Totals</u>	<u>118.00</u>	<u>121.00</u>	<u>454.000</u>
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Term Honor: Dean's List

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
CRIM 2003	INTRO CRIMINAL JUSTICE	3.00	A	12.000
JOUR 3633	MEDIA LAW	3.00	A	12.000
MUAC 1161	INSTR IN NON MAJOR PIANO	1.00	A	4.000
PLSC 4193	ADMINISTRATIVE LAW	3.00	A	12.000
PLSC 4213	CAMPAIGNS AND ELECTIONS	3.00	B	9.000
PLSC 4323	RACE IDENTITY & POLITICS	3.00	A	12.000

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 2019-05-11
Plan: Political Science
Plan: African and African American Studies - Minor

End of Unofficial Copy

Beginning of Graduate Record

Fa 2019

Graduate Arts & Sciences
Political Science Major

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
<u>Term GPA</u>	<u>3.813</u>	<u>Term Totals</u>	<u>16.00</u>	<u>16.00</u>	<u>61.000</u>
<u>Cum GPA</u>	<u>3.833</u>	<u>Cum Totals</u>	<u>108.00</u>	<u>111.00</u>	<u>414.000</u>

Good Standing

Sp 2019

Fulbright Col of Arts & Sci
Political Science Major
African and African American Studies Minor

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
PLSC 5043	THE U.S. CONSTITUTION I	3.00	A	12.000
PLSC 5213	SEM: AMER POLITICAL BEHAVIOR	3.00	A	12.000
PLSC 5913	RESEARCH METHODS POL SCI	3.00	A	12.000

<u>Course</u>	<u>Description</u>	<u>Attempted</u>	<u>Grade</u>	<u>Points</u>
AAST 2023	AFRICAN AMERICAN EXPERIENCE	3.00	A	12.000
AAST 3293	AFRICAN AMERICAN POLITICS	3.00	A	12.000
MUEN 4491	CONCERT BAND IV	1.00	A	4.000
THTR 1003	BASIC COURSE: THEATRE APP	3.00	A	12.000

			<u>Attempted</u>	<u>Earned</u>	<u>Points</u>
<u>Term GPA</u>	<u>4.000</u>	<u>Term Totals</u>	<u>9.00</u>	<u>9.00</u>	<u>36.000</u>
<u>Cum GPA</u>	<u>4.000</u>	<u>Cum Totals</u>	<u>9.00</u>	<u>9.00</u>	<u>36.000</u>

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Name: Warrington Sebree
Student ID: 010723118

Good Standing

Sp 2020

Graduate Arts & Sciences
Political Science Major

Course	Description	Attempted	Grade	Points
PLSC 5253	POLITICS OF RACE & ETHNICITY	3.00	A	12.000
PLSC 5503	COMPARATIVE POLITICAL ANALYSIS	3.00	A	12.000
PLSC 600V	MASTER'S THESIS	3.00	R	0.000

Course	Description	Attempted	Grade	Points
PLSC 500V	SPECIAL TOPICS CRITICAL RACE THEORY	3.00	P	0.000
PLSC 5163	PUBLIC POLICY	3.00	A	12.000
PLSC 5203	SEMINAR: AMER POLITICAL INST	3.00	A	12.000

Term GPA	4.000	Term Totals	6.00	9.00	24.000
Cum GPA	4.000	Cum Totals	27.00	33.00	108.000

Term GPA	4.000	Term Totals	6.00	9.00	24.000
Cum GPA	4.000	Cum Totals	15.00	18.00	60.000

Good Standing

Sp 2021

Graduate Arts & Sciences
Political Science Major

Course	Description	Attempted	Grade	Points
AAS 5003	AAS GRADUATE SEMINAR	3.00		0.000
PLSC 5943	ADVANCED RESEARCH METHODS	3.00		0.000
PLSC 600V	MASTER'S THESIS	3.00		0.000

Course	Description	Attempted	Grade	Points
AAS 5103	AAS GRADUATE READINGS	3.00	A	12.000
PLSC 595V	RESEARCH PROBLEMS POL SCI	3.00	A	12.000

Term GPA	0.000	Term Totals	0.00	0.00	0.000
Cum GPA	4.000	Cum Totals	27.00	33.00	108.000

Term GPA	4.000	Term Totals	6.00	6.00	24.000
Cum GPA	4.000	Cum Totals	21.00	24.00	84.000

Graduate Career Totals					
Cum GPA:	4.000	Cum Totals	27.00	33.00	108.000

Good Standing

Fa 2020

Graduate Arts & Sciences
Political Science Major

Degrees Awarded
Degree: Bachelor of Arts
Confer Date: 2019-05-11
Plan: Political Science
Plan: African and African American Studies - Minor

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Name: Warrington Sebree
Student ID: 010723118

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June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Warrington Sebree's judicial clerkship application

Dear Judge Walker:

I write this letter in enthusiastic support of Warrington's clerkship application. Warrington was a student in both my Legal Writing I and II courses at Howard University School of Law. I have come to know Warrington's many strengths and skills well, and I think he will be a fantastic judicial clerk.

Warrington excels at reading, analyzing, and applying the law. In our first-year class, students represented a Black, Muslim woman in a hypothetical case of racial and religious discrimination under Title VII. Warrington consistently earned praise for his legal research and ability to synthesize rules and craft compelling legal arguments. He aims for perfection, and we met frequently throughout the year so that he could get my feedback to hone his work product. Warrington demonstrated consistent progress on his assignments, and, on his final motion brief, my comments were almost all superficial and stylistic because he had authored a compelling submission, one of the strongest briefs in the class. Warrington earned a 95/100 on his oral argument and a perfect 10/10 on his citations, a feat that sets him apart from his peers and highlights his dedication and attention to detail. He finished the year in the top ten in his class.

As a second-year student, Warrington continued to hone his legal research and writing skills in my Legal Writing II appellate advocacy class. The class used the law to argue both sides of an appeal denying asylum to a doctor who was persecuted by gang members in El Salvador. It was the first time I set both a legal and factual issue for appeal, which many students found difficult to navigate. Warrington rose to the challenge, quickly grasping both sides of each issue and preparing a persuasive case for each client. He continued his streak of excellent research, writing, and oral advocacy earning high marks on each assignment, finishing second in the course with an "A" grade overall. As a result of his performance in both Legal Writing I and II, Warrington was hired by the Legal Writing department as a Howard Ramsey Dean's Fellow for the 2023-24 academic year to help incoming first year law students learn legal writing and research and negotiate law school in general.

Beyond his performance in class, I have valued Warrington's commitment to social justice. He is interested in the implications of the law on communities of color and the poor. He is a frequent participant in class who asks thoughtful questions about the impact of the law beyond the hypothetical client we are working with. Notably, he strives to incorporate relevant policy arguments on each assignment. Most young lawyers shy away from policy arguments because they do not always follow the clear argument structure they are taught in their courses. Warrington's aptitude for drafting and effectively employing policy arguments demonstrates his comfort with the law and his skill as a writer. He will be an asset to any team he serves on.

I have also gotten a good sense as to why Warrington will make an excellent employee. Warrington is thorough and self-directed in his research. He will do the necessary work and prepare a strong draft, but he recognizes when he has questions or needs guidance to move forward with an assignment. Warrington's collegiality and professionalism is also well known around the Howard Law campus. He seeks to contribute to the Howard Law and the legal communities in any way he can. He mentors new students, serves on a volunteer committee to select the new Dean, and is chosen by his peers for leadership roles in his extracurricular activities. I have never heard the faculty speak more highly of a student than they have of Warrington.

Due to his maturity and perspective, I have already come to think of Warrington as my colleague. He will be an exceptional attorney not only due to his academic strengths but because of his quest to understand and use the law to further the concept of justice. You will not regret having him as your clerk.

If I may be of further assistance to his application, please do not hesitate to reach out to me via email or phone.

Sincerely,

Kacey Mordecai
Assistant Professor of Lawyering Skills
Howard University School of Law
kmordecai@gmail.com | kacey.mordecai@law.howard.edu
773-510-4680

Kacey Mordecai - kmordecai@gmail.com

HOWARD
UNIVERSITY

SCHOOL OF LAW

June 15, 2023

Dear Judge:

I am writing this letter to enthusiastically recommend Warrington Sebree for a judicial clerkship. I first got to know Warrington as JL Greene Scholar. The JL Greene Scholarship is the most prestigious scholarship at Howard Law. As a Greene Scholar, Warrington was identified as one of the best in his class in terms of academic excellence and commitment to public service. Warrington is also a Senior Articles Editor for the *Howard Human & Civil Rights Law Review* and the *Henry Ramsey Dean's Fellow*.

Warrington's legal ability is shared by many of my most demanding colleagues, administrators, and his peers. He ranked in the top percentile or received top grade in his classes. He enjoys writing, research, and the revision process.

I've also come to know Warrington quite well as an individual. He is an exceptional student and individual. I am confident he would do an outstanding job as a law clerk in your chambers, as his passion for appellate litigation is undeniable.

As you will see from Warrington's resume, he is not your average law student. Warrington's education, experience and service proves him to be an extraordinary bright and capable student who is unafraid of grappling with complex issues. Warrington is very articulate, precise, and thoughtful.

I believe Warrington will be a valuable law clerk and a pleasure to work with. I recommend him to you with no reservations. If you have any further question, please feel free to contact me via email at danielle.holley@law.howard.edu.

Best regards,

Danielle Holley

Danielle R. Holley

Dean

Howard University School of Law



2900 Van Ness Street, NW
Washington, DC 20008

(202) 806-8000
Fax (202) 806-8428
law.howard.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

With great pleasure and enthusiasm, I recommend Warrington Sebree for this judicial clerkship position! He is mature, compassionate, respectful, and ethical, with a palpable commitment to justice and service of the public interest. In fact, Sebree's commitment to a more traditional public interest career has been unwavering, despite the high tide of opportunity for our law students to go into big law practice.

I first met Sebree (I use last names) in my Con Law I class (Spring 2022) and subsequently had him in Con Law II (Fall 2022). He was consistently on time, prepared, engaged, and intellectually curious, having given considerable thought to the assigned readings and their impact. I could count on him to contribute meaningfully to class discussion and he routinely took advantage of my office hours to explore nuances or just to chat. I have been Sebree's course planning advisor and faculty advisor for his student Note required of him as a Staff Editor on the Howard Human and Civil Rights Law Review ("HCR"). I also have had opportunity to observe his work as a student representative for new faculty interviews and on the Decanal Search Committee for the next Dean of Howard University School of Law, which he has approached with appropriate rigor. Overall, I have gotten to know Sebree on an individual basis through numerous conversations ranging from personal career choices and course advising to constitutional law issues in the news and much in between.

Based upon my various interactions with him, I have every confidence that Sebree will diligently execute on research and writing assignments as a judicial law clerk, and that he will thoughtfully engage in exploration of the policy and justice implications of decisions that have the potential to change law. In addition, he is easy to work with, personable, and humble.

Again, I strongly recommend Sebree for this judicial clerkship. Please do not hesitate to reach out if you would like to speak with me as you consider his application. You may reach me via email at tuneen.chisolm@howard.edu or by phone at 678.763.6405. Please note that I will be traveling intermittently over the summer, so email is a best method for initial contact.

Kindest regards,

Tuneen Chisolm
Associate Professor of Law
Howard University School of Law
<http://law.howard.edu/faculty-staff/tuneen-chisolm>

Tuneen Chisolm - tuneen.chisolm@howard.edu

Warrington E. Sebree

4601 Connecticut Ave NW, Washington, D.C. 20008
Warrington.Sebree@law.bison.howard.edu, (501) 749-4301

Re: Explanation of writing sample

My writing sample is an opinion I wrote for my Supreme Court Jurisprudence class. In this class, we wrote three opinions throughout the semester on cases pending before the Court. Each student wrote their opinion individually and we specified whether we were writing in the “majority”. Supreme Court Jurisprudence is a seminar class, not a course designed to teach legal writing mechanics. My professor read one draft of this opinion and provided general feedback on content via email before I submitted the finalized version. I earned a 90/100 on this opinion and my professor emailed me brief comments about what they thought I did well and where I could have taken a different approach. I did not receive any line edits or technical feedback.

This opinion is on *Department of Education v. Brown et. al.*, the student debt relief case argued before the Court this term. In real life the two cases brought by the states and individuals were consolidated. However, my Court only addressed the case of the individuals. Please note that while I hold that the Respondents lack standing, the class required us to address the merits.

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

No. 22-535

DEPARTMENT OF EDUCATION, ET AL, PETITIONERS
v.
MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES
COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

[February 15, 2023]

CHIEF JUSTICE SEBREE delivered the opinion of the Court.

The HEROES Act grants the Secretary of Education (“Secretary”) the authority to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency.” 20 U.S.C. § 1098bb(a)(1). Amidst the COVID-19 pandemic, the Secretary created a loan-forgiveness program to provide up to \$20,000 in debt relief to eligible borrowers. Myra Brown and Alexander Taylor were deemed ineligible for relief and filed suit to challenge the Program as an unlawful exercise of the Secretary’s authority.

There are two issues before this Court: (1) Respondent’s argue they have standing to challenge the Program because the Secretary denied them of their procedural right to advocate for Program expansion through notice-and-comment required by the APA. (2) Respondents argue that the Program is unlawful because the Secretary lacks the authority to implement the Program.

The district court held that Respondents had standing to challenge the Secretary’s authority under HEROS, and vacated the Program finding it is an unlawful exercise of authority because it was not clearly authorized by Congress. The Government filed a motion with this Court to stay the judgment pending appeal which we treated as a petition for a writ of certiorari before judgment and granted certiorari.

The Majority holds that Respondent’s do not have standing and the Secretary acted within their lawful authority. I write to concur in part on the Majority’s holding that

Opinion of the Court

Respondent's lack standing and dissent in part that the Secretary exceeded their authority because the major questions doctrine applies.

(I)

Article III Sec. I authorizes the Court to hear several "Cases" and "Controversies" which this Court has interpreted to limit federal courts to redress or prevent concrete or immediate threatened injury caused by a violation of law. Standing is one of several justiciability doctrines that ensures this Constitutional requirement is met. To establish standing the plaintiff must have suffered an injury in fact that is concrete, imminent, and particularized and not conjectural or hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be fairly traceable to the challenged action, and it must be likely that a favorable decision will redress the plaintiff's injury. *Id.* The party seeking to invoke this Court's jurisdiction bears the burden to show that they have standing to obtain the requested relief.

Respondents argue that there is standing to challenge the Government's Program because the Program's enactment without notice-and-comment deprived them of their procedural right. *See Resp't Br.* at 25. Respondents argue that passing Program under the HEROS Act was procedurally improper because the Secretary did not conduct the negotiated rulemaking and notice-and-comment process as required by the APA. *Id.* Respondents argue this deprivation of procedural right precluded them from protecting their concrete interests to participate in negotiated rulemaking prior to the Secretary promulgating the Program. *Id.* However, this Court is puzzled by this argument because Respondents assert standing to challenge the HEROS Act yet concedes that HEROS does not grant the procedural right to negotiated rulemaking. As such, Respondents cannot say they have suffered an injury in fact because a party's standing cannot depend on the outcome of the merits of a case pending before the Court.

Moreover, Respondent's lack standing because their injury is "purely speculative". *Lujan*, 504 U.S. at 560-61. Respondents do not assert a procedural right to notice-and-comment under HEROS. Rather, Respondents argue HEROS is unlawful. This alleged injury is speculative because it assumes that if HEROS is struck down as unlawful the Secretary will not circumvent APA negotiated rulemaking requirements under the

Opinion of the Court

HEA as well. Additionally, even if we did accept Respondent's position that striking the Program under HEROS "wouldn't preclude the Secretary from forgiving Respondents' debt under the HEA" (Resp't Br. at 30), this argument is also speculative because the Government could elect to abandon the Program altogether. As such, Respondents' speculative injuries lack redressability.

Respondents also fail to establish procedural standing. This Court has recognized that a plaintiff may establish standing by asserting a procedural right to protect an individual's concrete interests and may obtain relief without satisfying the redressability and immediacy requirements for normal standing. *See Lujan*, 504 U.S. at 572. Respondents rely heavily on *Lujan* and *Summers* to justify their procedural standing, therefore the Court reviews both decisions to clarify the appropriate application for procedural standing.

Respondents cite *Lujan* in support of their procedural injury. Particularly, the Respondent's argue that, unlike the Plaintiff in *Lujan*, Respondents do not allege a procedural right *in vacuo* because they have a concrete interest in participating in negotiated rulemaking granted by the HEA. *See* Resp't Br. at 25. However, the Program Respondents seek to challenge was promulgated under the HEROS Act, not the HEA. To challenge the HEROS Act, Respondents must have standing. Here lies the confusion of this Court: how may Respondents claim standing to raise a procedural injury when the challenged Act provides no such right?

In this case, Respondent's do not have standing to claim the procedural right to negotiated rulemaking because Congress specifically did away with this requirement under the HEROS Act. *See Mass. v. EPA*, 549 U.S. 497, 517 (2007) (finding procedural standing for "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests.'") (citation omitted). Moreover, by asserting a right to notice and comment under the HEA and not the HEROS Act, under which the Program passed, Respondent's concede that the HEROS Act does not deprive them of any procedural right. Absent a procedural right under HEROS, Respondent's assert a procedural right *in vacuo* because Congress explicitly did away with the negotiated rulemaking requirement in the HEROS Act.

In *Summers*¹, the Court found a procedural right under the Forest Service Decision-making and Appeals Reform Act because Congress required the Forest Service to "establish a

¹ *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

Opinion of the Court

notice, comment, and appeal process . . .”. *Summers*, 555 U.S. at 490. Again, Congress did not include such requirement under the HEROS Act. In fact, Congress did away with this requirement which tends to show an intent to remove standing for individuals like Brown and Taylor. Indeed, a concrete injury *may* occur in the deprivation of a right that “exist[s] solely by virtue of ‘statutes creating [a] legal right . . .’”. *Id.* at 578. However, when there is no procedural right to be deprived, it cannot be logically said that there is a concrete injury sufficient to show there is standing to obtain the requested relief.

When the express will of Congress is clear, it is not this Court’s duty to second-guess the actions of the legislature. The District Court improperly ruled on the merits on the case and should not have reached this argument once it found Respondent’s lack standing. In concluding such, we make it clear that the Respondent’s lack of standing has no bearing on the merits of the Program as a lawful exercise of authority.

(II)

Assuming *arguendo* that Respondents have standing, the issue is whether granting loan-relief is within the Secretary of Education’s authority.

We begin statutory interpretation with a review of the text to determine whether the language granting the Secretary authority to relieve debt is plain and unambiguous. *Am. Tobacco Co. v Patterson*, 456 U.S. 63, 68 (1982). If the meaning of the statute remains ambiguous, the Court endeavors to ascertain the intent of the legislature. *Id.* at 71.

Under HEROS the Secretary may respond to a “national emergency” by “waiv[ing] or modify[ing] any statutory or regulatory provision” governing the federal student loan programs to “ensure” that affected student-loan borrowers are not “placed in a worse position financially” in relation to their loans because of the emergency. 20 U.S.C. §§ 1098bb(a)(1) and (2). Respondents argue that the HEROES Act never “mention[s] loan forgiveness.” Resp’t Br. at 44. Webster’s dictionary defines “forgive” as “to grant relief from payment”; “waive” is defined as “to relinquish voluntarily”; and “modify” is defined as “to make minor changes in”². As a textual matter, the Court does not find any substantive difference in these definitions. They are all

² Webster's Dictionary, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/> (last visited Feb. 15, 2023).

Opinion of the Court

synonyms in the context of loans: when federal loans are “forgiven”, the Government is voluntarily relinquishing a borrower’s obligation to pay, even if only a portion of the borrower’s total debt is waived.

Respondents argue that the legislative history of HEROS indicates that the Act’s primary purpose is to grant student loan relief to military personnel. Resp’t Br. at 43. However, HEROS allows the Secretary to waive debt for borrowers in connection to “military operation or national emergency”. 20 U.S.C. §§ 1098bb(a)(1) and (2) (emphasis added). This Court has historically interpreted statutes with the presumption against surplusage as we assume that Congress included each word for a particular purpose. It may be argued that the Court interpret HEROS under the *ejusdem generis* canon which would narrow “national emergency” to situations involving “war or military operations”. We are unpersuaded by this argument because is contradicted by the use of HEROS to pause all student-loan repayments in 2020 due to the COVID pandemic. As such, it is clear that Congress intended for HEROS to apply to a wider scope of national emergencies than solely military operations.

Following this rationale, the Court finds that HEROS does grant the Secretary *some* authority to waive borrower’s student loan debt. However, this authority is not without limits. As both party’s highlight the highly political nature of the Program, the large economic undertaking, and broad social impact, the Court pauses to determine if the Secretary’s interpretation of HEROS should be deferred to. The Court elects to invoke the major questions doctrine to assess only the scope of the Secretary’s authority to promulgate a debt relief Program of this magnitude.

The major questions doctrine is a judicially created maxim that is rooted in separation of powers principles. Under major questions, this Court has historically questioned Congress when it appears that it delegated “sweeping and consequential authority ‘in so cryptic a fashion.’” *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). This Court applies the major questions doctrine to resolve matters of political significance, economic significance, and when intruding in state’s domain. *See West Virginia*, 142 S. Ct. at 2621-22. The Court considers other factors such as whether the agency has previously acted this way, if Congress declined to act, and the specificity of the statute. *Id.*

Opinion of the Court

We recently addressed the major questions doctrine in *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, where we held that the Center for Disease Control and Prevention did not have the authority to adopt measures “necessary to prevent the ... spread of” the COVID–19 pandemic. *Alabama Assn. of Realtors*, 141 S.Ct. 2485, 2487 (2021) (*per curium*).

Here, this Court believes that the unprecedented nature of the Government’s Program combined with its projected economic impact justifies the application of the major questions doctrine. Both party’s briefs recognize the Program is highly politicized and is estimated to waive \$1.6 trillion in debt. Moreover, the Government’s proffer that the COVID-19 pandemic’s “profound disrupt[ion] [on] the Nation’s economy” and the “severe economic harm”³ inflicted is even more reason for the Court to pause before ruling the Secretary has authority to act in such a way. In lieu of this decision, and, provided that the Government raises the COVID-19 pandemic as a justification for the Secretary of Education being able to invoke the provisions under HEROS, this Court elects to review the Department’s authority.

Although loan forgiveness is important to the country and will improve the lives of countless Americans, the Court pauses to do its due diligence to examine the Program’s legal authority because such an undertaking is bound to have drastic precedential impact. This is an “extraordinary case in which history and the breadth of the authority that [the Department of Education] has asserted,” and the “economic and political significance” of providing broad student-loan relief while curtailing normal administrative procedures, provide a “reason to hesitate before concluding that Congress” meant to confer such authority. *Brown & Williamson*, 529 U.S. at 159-160. The Court takes this juncture to reiterate that this finding in no way means that student-loan forgiveness is not a worthwhile and necessary Program. Rather, this Court has assumed the duty of ensuring that an agency does not “resolve for itself the sort of question normally reserved for Congress.” *West Virginia*, 142 S. Ct. at 2622. To be clear, the Court’s current inquiry is not a matter of constitutionality. In identifying a major question, the Court must now determine whether HEROS contains a “clear congressional statement authorizing the [Secretary of Education’s] action.” *Id.*

³ Resp. Br. at 7.

Opinion of the Court

In making such determination, the Court considers: (1) “the legislative provision” that grants the agency authority; (2) “the age and focus of the statute” at issue; (3) the agency’s “past interpretations of the statute at issue; and (4) whether the “agency’s challenged action” is incongruent with “its congressionally assigned mission and expertise”. *West Virginia*, 142 S. Ct. at 2622-63.

(1) The legislative provision at issue allows the Secretary to “waive or modify any statutory regulatory provision” regarding federal loans “as the Secretary deems necessary” in times of “national emergency”. 20 U.S.C. §§ 1098bb(a)(1) and (2). Because this Court already addressed Congress authorizing an agency to carry out statutory provisions to the extent it “deems necessary”⁴, the Court elects to apply the same analysis here. In *Webster*, this Court drew a distinction between an agency carrying out actions it *deems* necessary versus *is* necessary. *See Webster* 486 U.S. at 600. The Court held that the deference that exudes from allowing an agency to carry out what it “deems necessary” “foreclose[s] . . . any meaningful judicial standard of review” because there is no basis for a reviewing court to “properly assess” the agency’s decision. *Id.* (explaining that the Court could not properly assess the Director’s decision without permitting cross-examination of the Director’s views of national security).

(2) The statute at issue is the HEROS Act. Both parties mention that the HEROS Act, at its inception, provided the Secretary of Education the authority to “waive or modify” student loans to prevent borrowers effected by the September 11 terrorist attacks from being in a worse position regarding their loans. Here, we are unpersuaded that Congress had this broad debt relief program in mind when extending the HEROS Act over the past twenty years. This Court is apprehensive to accept “an agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem”. *West Virginia*, 142 S. Ct. at 2623. Moreover, because the statute grants “extraordinary . . . regulatory authority through vague language”, this Court takes this as a “warning sign that [the agency] is acting without clear congressional authority.” *Id.*

(3) Congress passed the HEROS Act in 2001 that authorized the Secretary to waive student loans under Title IV of the HEA to ensure borrowers affected by 9/11 “are not in a worse position in relation to their student loans.” Pet’r Br. at 5. In 2003, Congress expanded the reach of HEROS to allow the

⁴ *See Webster v. Doe*, 486 U.S. 592, 600 (1988).

Opinion of the Court

Secretary to exercise this power in connection with “a war or other military operation or national emergency . . .” and defined national emergency as “declared by the President of the United States.” Congress reauthorized HEROS in 2005 and permanently codified the statute in 2007. HEROS’ twenty-year existence cannot be “contemporaneous and long-held” because this Court found an agency exceeded its authority under statutes codified twice as long as HEROS. *See West Virginia*, 142 S. Ct. at 2623; citing *NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (finding agency never adopted a broad public health regulation under OSHA which existed for 50 years). Moreover, the Government asserts that the Secretary has the authority to “grant student-loan relief to *particular classes* of borrowers.” Pet. Br. at 4 (emphasis added)⁵. The use of HEROS to pause student-loan repayments during the COVID pandemic is arguably a “particular class” because it applied to all borrowers. The Court does not question the Secretary’s use of fair and reliable methods in determining who qualified for relief. However, the Government does not point to any moment in the past twenty years where HEROS was used to waive loans for over 40 million borrowers. Therefore, “when an agency claims to have found a previously unheralded power” the Court has cause to be skeptical. *West Virginia*, 142 S. Ct. at 2623.

(4) For the same reasoning as above, the Court is skeptical that Congress granted the Secretary this much authority because “there is a mismatch between [the Secretary’s] challenged action and its congressionally assigned mission and expertise. *West Virginia*, 142 S. Ct. at 2623. To reiterate, the history of HEROS’ codification shows that the Secretary has provided relief to “particular classes”⁶ of

⁵ In 1991 Congress granted student loan relief in response to the Persian Gulf Conflict; In 2001 Congress used the act to relieve borrowers affected by 9/11; Post 2003, Congress used HEROS to waive overpayments of *certain* grant funds, waived loan cancellation requirements for *certain occupations*, and extended eligibility for *Perkins loans* and *Family Education Loans*. Pet. Br. at 4-7. I use italics to highlight that there is record of Congress using HEROS to impact “particular classes of borrowers”. We find no such “particular class” in this iteration of the Secretary invoking the provisions under HEROS.

⁶ Additionally, some of my Colleagues and amici argue that the program is lawful because student-loan relief has disproportionate impact on low-income borrowers, specifically borrowers of color. With respect to the business of this Court, this is a value judgment. In fact, low-income or borrowers of color *would* be a “particular class of borrower” subject to Constitutional scrutiny. Nonetheless, Congress nor the Secretary narrowed the scope of the program to this particular class and thus we are

Opinion of the Court

borrowers. The Court is not convinced that the Secretary has any “comparative expertise” determining the effectiveness, impact, and consequences of waiving trillions of dollars in student-loans. *Id.* Therefore, with no clear indication that this mass debt-relief program is within the Secretary’s “sphere of expertise”, the Court’s position is that “Congress presumably would not task it with doing so.” *Id.*

My colleagues in the Majority suggest that *West Virginia* is not applicable. Specifically, the Majority argues that, unlike *West Virginia*, the text of HEROS clearly authorizes the Secretary to implement the program. While the Secretary does have authority to provide *some* debt relief, for the reasons laid out above, it cannot be said that the provisions of HEROS are even remotely clear as to the extent of that authority. The fact that there is limited case law regarding the degree of specificity required by Congress to grant such authority during a national emergency gives even more reason for the Court to pause out of skepticism.

Additionally, the Majority argues that invoking major questions usurps the power of the Executive to respond during national emergencies. The President having unenumerated power to respond to national emergencies is a principle that dates back to *Youngstown*.⁷ There, and in many other cases, the Court addressed challenges to executive authority during national emergency on a case-by-case basis and struck executive action not authorized by Congress.⁸ While the executive branch has a “need for effective power” during times of emergency, there is also a “need for limitations on the power of governors over the governed.” *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring). At this time, if the Majority is unable to see the economic and political significance of this case, we worry that this ruling fails to provide any meaningful guidance as to when, if at all, the Court is permitted to intervene.

Finally, courts must be aware of the dangers of allowing the major questions doctrine precedent to become unwieldy. Thus, as a policy matter, I take this time to address the proper application of major questions and uses this case as an illustration.

unpersuaded that excessive impact on underrepresented communities supports granting the Secretary unwieldy authority.

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸ *Id.* see also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) (striking New York Governor’s order to restrict religious gatherings during the pandemic).

Opinion of the Court

To be clear, the Secretary of Education does have some authority to waive student-loans under HEROS. The fact that the Secretary has exercised this authority over the past twenty years could serve as an indicator that Congress intended to allow the Secretary to circumvent APA negotiated rulemaking requirements. However, debt relief of this magnitude? We, the dissenters, are not so sure. To be clear, the major questions doctrine should not be used as a means for the Court to engage in the political wagering of the Executive and Congress. Failure to exercise this doctrine with the upmost restraint and with exacting scrutiny would abdicate this Court of its legitimacy.

The Court finds no consistent record of the Secretary exercising such vast authority as we see here. Moreover, both parties highlighted the politicization of student-loan relief.⁹ The Court also does not take lightly the significant economic and political implications of student-loan relief of this magnitude. The President, with the aid of the many resources at the executive branch's disposal, found the path of least resistance to accomplish one of the Administration's campaign promises. Congress, elected to remain silent as a body to let the Court decide the fate of the Program. This is political wagering. This esteemed body has no business relegating itself to these matters as we would rob the American people of the ability to do what they should do when their elected officials pass law and policies that impact their daily lives: hold them accountable with a vote. We are an unelected body and decline the opportunity to enter the realm of politics. If the democratically elected representatives wanted to pass this Program, it would have ensured that the Secretary had the appropriately specific marching orders to undertake such a Program to ensure that it would not be held up in litigation. We see no action. Even now, nothing is stopping

⁹ The Court notes the Government's point that the Trump administration permitted the Secretary to act pursuant to HEROS to pause student-loan payments. Other Justices of this Court argue that this decision before us is not inherently political because Democrats and Republicans use HEROS for student-loan relief. However, when looking at both actions taken by the executive, the circumstances are not congruent. The Trump Administration paused repayments for all borrowers—an equal measure supported on all fronts—in response to the unprecedented effects of COVID-19. The Biden Administration invokes this power to provide loan relief, for people that were negatively impacted by the pandemic. But campaigning on this Program exacerbated its politicization. We do not postulate on the political motivations of either Administration. Rather, the Court notes that the previous Administration's use of HEROS has no bearing on the political nature of the current Administration's use of the HEROS Act.

Opinion of the Court

Congress from amending HEROS or passing legislation to grant even broader debt-relief if it so chose.

Therefore, the Court holds that Congress was not sufficiently specific with the provisions of HEROS to grant the Secretary with the authority to relieve student loans this broadly. If the Government believes they have the support of the populous to relieve student-loans, it should have no problem passing it through Congress. In issuing this judgment, the Court does not “appoint itself the decision-maker on [student-loan relief].” *West Virginia*, 142 S. Ct. at 2628. Nonetheless, at this juncture, the Court must intervene to ensure that the people and their elected representatives decide the laws that govern.

It is so ordered.

Applicant Details

First Name **William**
 Middle Initial **C**
 Last Name **Seidel**
 Citizenship Status **U. S. Citizen**
 Email Address coltonseidel@icloud.com

Address
Address
Street
755 E Broad St., Apt. 807
City
Athens
State/Territory
Georgia
Zip
30601
Country
United States

Contact Phone Number **8048954240**

Applicant Education

BA/BS From **University of Virginia**
 Date of BA/BS **August 2021**
 JD/LLB From **University of Georgia School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51102&yr=2011
 Date of JD/LLB **May 15, 2024**
 Class Rank **25%**
 Law Review/Journal **Yes**
 Journal(s) **Georgia Criminal Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

David, Douds
ddouds@gapublicdefender.org
678-294-7362

Scartz, Christine
cmscartz@uga.edu
(706) 369-6272

Cook, Julian
cookju@uga.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William Colton Seidel
755 E. Broad St., Apt. 807
Athens, GA 30601
William.seidel@uga.edu | 804-895-4240

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Clerkship 2024-2025

Dear Judge Walker,

I am a 2L at the University of Georgia School of Law, and I am writing to apply for a 2024–2025 clerkship with your chambers. I have a strong interest in pursuing a career in litigation, and this would be a great opportunity to gain a deeper understanding of working in a federal courtroom.

I believe my academic and work experiences have prepared me to make a productive contribution. I was an extern this past fall with the Western Judicial Circuit Public Defender in Athens. There I worked closely with my supervising attorney representing indigent clients in Superior Court. In my role, I was able to draft motions, do legal research into case-specific issues, and conduct hearings on behalf of our clients in court.

This past summer I worked full-time as a summer intern at the Family Justice Clinic here at UGA under Professor Christine M. Scartz. My responsibilities covered the entire lifespan of a case, from an initial client intake to representing clients at their final hearing in Superior Court. I drafted motions and pleadings, such as protective order petitions for domestic violence victims. I also conducted legal research about pertinent issues in our cases to assist myself and Professor Scartz in representing our clients.

In addition, this past summer I also worked as a research assistant for Professor Julian Cook. As a research assistant, I prepared a memorandum on the comparative advantages of the prosecutor in federal plea bargaining. This required a thorough assessment and synthesize of the academic literature regarding federal plea bargaining into a detailed summarization for Professor Cook to use in his scholarship.

Thank you for taking the time to consider my application. My resume, unofficial transcript, letters of recommendation, and writing sample will be submitted through OSCAR. Please feel free to contact me with any additional questions you may have, and I look forward to hearing from you.

Sincerely,



William Colton Seidel

William Colton Seidel

755 E. Broad St. Apt. 807 • Athens, GA 30601 • William.seidel@uga.edu • 804-895-4240

EDUCATION

University of Georgia School of Law, Athens, GA

J.D. expected, May 2024

GPA: 3.56, Rank 47/190 (Top 25%)

Honors: Law School Association Scholarship (meritorious)

Publications: *Wolf in Sheep's Clothing: How Victims Rights' Bills Continue to Simultaneously Let Down Both Crime Victims and Defendants* 1 GA. CRIM. L. REV. (forthcoming)

Activities: *Georgia Criminal Law Review*, Managing Board, inaugural editorial board member
Criminal Law Society, section representative

University of Virginia, Charlottesville, VA

B.A. in Psychology, *with distinction*, May 2021

GPA: 3.61

Associations: Pi Lambda Phi Fraternity, Brotherhood Chair
American Psychology-Law Society, student member

EXPERIENCE

The Honorable Kimberly M. Esmond Adams,

May 2023 – August 2023

Superior Court of Georgia, Atlanta Judicial Circuit

Summer Judicial Intern

Western Judicial Circuit Public Defender, Athens, GA

August 2022 – November 2022

Externship

- Worked under a supervising attorney in Superior Court representing indigent defendants
- Conducted client intake interviews and communicated with clients regarding their case
- Researched and wrote memos concerning legal issues pertinent to clients' cases
- Represented clients in court hearings under the supervision of the assigned attorney
- Drafted motions, such as for bond reduction and motions to suppress

University of Georgia School of Law, Athens, GA

June 2022 – July 2022

Research Assistant for Professor Julian A. Cook, J. Alton Hosch Professor of Law

- Researched and prepared a comprehensive memo on the comparative advantages of federal prosecutors against defense attorneys in plea negotiations

University of Georgia School of Law Jane W. Wilson

May 2022 – August 2022

Family Justice Clinic, Athens, GA

Summer Law Intern

- Drafted motions, orders and pleadings for protection orders, divorces, and other family law trial court proceedings
- Conducted hearings in Superior Court representing clients where I gave opening and closing statements, conducted the examination of witnesses, and tendered evidence to the court
- Helped negotiate with opposing counsel or pro se litigants
- Answered client phone calls, emails and led meetings with clients
- Researched and wrote a memo on the right to be heard under Marsy's Law in Georgia

/StudentSelfService/)

William C. Seidel

Student Unofficial Transcript

Unofficial Transcript

Transcript Level

Law

Transcript Type

Unofficial Web

Student Information

Institution Credit

Transcript Totals

Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

William C. Seidel

Birth Date

29-NOV

Curriculum Information

Program : Juris Doctor

College

School of Law

Major and
Department

Law, School of Law

Institution Credit

Term : Fall 2021

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4010	LW	Civil Procedure	A-	4.000	14.80	
JURI	4030	LW	Contracts	A-	4.000	14.80	
JURI	4071	LW	Legal Writing I	B+	3.000	9.90	
JURI	4072	LW	Legal Research I	B+	1.000	3.30	
JURI	4120	LW	Torts	B	4.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	54.80	3.42
Cumulative	16.000	16.000	16.000	16.000	54.80	3.42

Term : Spring 2022

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4050	LW	Criminal Law	A-	3.000	11.10	
JURI	4081	LW	Legal Writing II	B+	2.000	6.60	
JURI	4090	LW	Property	B+	4.000	13.20	
JURI	4180	LW	Constitutional Law I	B	3.000	9.00	
JURI	4470E	LW	Criminal Procedure II	A-	3.000	11.10	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	51.00	3.40
Cumulative	31.000	31.000	31.000	31.000	105.80	3.41

Term : Fall 2022

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4250	LW	Evidence	A-	3.000	11.10	
JURI	4300	LW	Law and Ethics	A-	3.000	11.10	
JURI	4340	LW	Antitrust Law	B+	3.000	9.90	
JURI	5170S	LW	Criminal Defense Pract I	A	3.000	12.00	

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	5595	LW	Legal Topics Seminar	S	1.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	12.000	44.10	3.67
Cumulative	44.000	44.000	44.000	43.000	149.90	3.48

Term : Spring 2023

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4088	LW	Writing for Judicial Clerkship	A	2.000	8.00	
JURI	4213	LW	Legal Negotiation and Settlement	A-	3.000	11.10	
JURI	4570	LW	Federal Courts	A-	3.000	11.10	
JURI	4581	LW	Select Topics in Judicature	S	1.000	0.00	
JURI	5014	LW	Georgia Criminal Law Review	S	2.000	0.00	
JURI	5330	LW	Family Law	A	3.000	12.00	
JURI	5760	LW	Legal Malpractice	A-	2.000	7.40	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	13.000	49.60	3.81
Cumulative	60.000	60.000	60.000	56.000	199.50	3.56

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	60.000	60.000	60.000	56.000	199.50	3.56
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	60.000	60.000	60.000	56.00	199.50	3.56

Course(s) in Progress

Term : Fall 2023

Subject	Course	Level	Title	Credit Hours
JURI	4425	LW	Foreign Affs Natl Security	3.000
JURI	4460	LW	Crim Procedure I	3.000
JURI	4760	LW	Labor Law	3.000
JURI	5031	LW	Georgia Trial Court Practice	2.000
JURI	5280	LW	Environmental Law	3.000
JURI	5595	LW	Legal Topics Seminar	1.000



WESTERN JUDICIAL CIRCUIT PUBLIC DEFENDER OFFICE
440 College Avenue • Suite 220 Athens, Georgia 30601 • Telephone 706-369-6440 • Facsimile 706-369-6444

John W. Donnelly
Circuit Public Defender

May 30, 2023

RE: Letter Recommending W. Colton Seidel

To Whom It May Concern,

I write this letter to recommend W. Colton Seidel for employment. I had the pleasure of working with Mr. Seidel during his Fall 2022 semester at the University of Georgia School of Law, at which time he worked for the Western Judicial Circuit Public Defender Office as an intern through the UGA Law Criminal Defense Practicum.

Mr. Seidel was an invaluable asset during his tenure with this office. He proved to be an effective and professional communicator, serving as a primary contact for dozens of my clients in the custody of the Athens-Clarke County Jail. Many inmates went out of their way to speak fondly of him which is an accolade most seasoned public defenders rarely enjoy.

Additionally, Mr. Seidel proved to be an effective legal researcher and writer. Rarely do I *not* need to hound interns about proper legal citation and avoidance of the passive voice. Mr. Seidel drafted motions and prepared memoranda for me that barely required notes. His ability to seek and secure answers on his own without asking first for help was noteworthy. I enjoyed working with him and he would be an asset wherever he ends up.

Please feel free to contact me with any questions should they arise.

Sincerely,

A handwritten signature in blue ink that reads "David T. Douds".

David T. Douds
Attorney at Law

Office of the Public Defender
Western Judicial Circuit
440 College Avenue, Suite 220
Athens, Georgia 30601
(706) 369-6448
ddouds@gapublicdefender.org



UNIVERSITY OF
GEORGIA

Christine Scartz
Clinical Associate Professor and Clinic Director

School of Law
Jane W. Wilson Family Justice Clinic
P.O. Box 1344
Athens, Georgia 30603-1344
TEL 706-369-6272 | FAX 706-227-7290
familyjusticeclinic@uga.edu

April 26, 2023

re: Letter of Recommendation for William Colton Seidel

To Whom it May Concern,

It is my honor and pleasure to write this letter of recommendation for William Colton Seidel. I have complete confidence that Colton will bring strong drive, determined enthusiasm, and creative intelligence to his work with you.

I am a Clinical Associate Professor at the University of Georgia School of Law and the Director of the Law School's Jane W. Wilson Family Justice Clinic. Colton worked for me in the Clinic fulltime during the summer of 2022. The Clinic represents low-income victims of domestic violence and stalking in emergency protective order cases in the Superior Courts of Georgia's Western Judicial Circuit. Colton was certified under Georgia's Student Practice Act to provide legal advice and courtroom representation to the Clinic clients.

Throughout his time in the Clinic, Colton spoke to and worked with dozens of victims seeking time-sensitive help in emotional, stressful, and even dangerous situations. I observed him every day providing accurate, understandable information to people over the phone and in person in a mature and confident manner while always remaining trauma-informed and client-centered. Colton also drafted clear and accurate petitions, motions, and proposed orders for the courts. Finally, Colton conducted protective order hearings under my supervision with a degree of self-possession beyond that displayed by the majority of my Clinic students over the years.

All of the tasks he performed in the Clinic required Colton to quickly learn law and procedure and integrate it in real time with client situations that were as varied as the clients themselves. When he approached each new client, Colton was always incredibly focused on finding the best solution for the individual. He accepted each challenge as an opportunity to both help someone who would otherwise have no legal guidance and to increase his own knowledge of the capacity of the law to address people's articulated goals. He was both self-directed and willing to ask questions when necessary.

Colton is also a student in my doctrinal Family Law class this semester (Spring 2023). I teach the class using collaborative pedagogy where, after I share foundational material for a

WCS recommendation page 2

portion of the class session, the students work together in small groups to enhance their understanding of the statutes, cases, and treatises. I limit the number of students enrolled in the class so I am able to observe them interacting with each other in their efforts to master the material. Throughout the semester I have observed Colton to be engaged with his classmates and leading both by contributing to and actively listening during group discussions. He clearly has the respect and admiration of his classmates and collaborates well with many different types of colleagues.

Finally, Colton is simply a wonderful person. He is easy to get along with and easy to work with. He has my highest recommendation. If I can answer any questions or provide you with additional information, please do not hesitate to contact me.

Sincerely,



Christine M. Scartz

Clinical Associate Professor and Clinic Director



School of Law
225 Herty Drive
Athens, Georgia 30602-6012
TEL 706-542-1046 | FAX 706-542-5556
cookju@uga.edu

Julian A. Cook, III
J. Alton Hosch Professor of Law

June 13, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Recommending William Seidel

Dear Judge Walker:

My name is Julian A. Cook, III, and I am a J. Alton Hosch Professor of Law at the University of Georgia School of Law. I am writing to support William Seidel's application for a law clerk position in your chambers. I enthusiastically submit this letter of recommendation.

I had the pleasure of having Mr. Seidel as a student in two courses (Criminal Procedure II and Evidence). He performed excellently in both classes. In short, Mr. Seidel is industrious and intelligent and would make a terrific law clerk. At all times, Mr. Seidel was attentive and appeared quite motivated to learn the material under discussion. When called upon (or elected to offer his views), Mr. Seidel made well-informed comments that reflected an individual who was well-prepared for class.

In addition, he performed some legal research for me during the summer of 2022. Not only was I delighted with his work product, but I also found him to be very conscientious. He regularly inquired of me to ensure his work met my expectations. Based on my classroom observations and experience with him as a researcher, Mr. Seidel would strongly excel as a law clerk.

After I graduated from law school, I clerked for a federal district court judge. Accordingly, I am fully cognizant of the duties and responsibilities that accompany the role of a law clerk. Mr. Seidel has all the qualities necessary to perform these critical duties superbly. He graduated from one of this nation's most competitive law schools and has demonstrated the ability to perform well in a competitive atmosphere. In my classes, he

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proved he could synthesize complex information and express himself clearly. It is my sincere hope that you will give his application serious consideration.

I strongly support his application. If you have any questions, please do not hesitate to contact me. I would be happy to elaborate upon the positive impressions expressed in this letter.

Sincerely,

Julian A. Cook, III

William Colton Seidel

755 E. Broad St. Unit 807, Athens, GA 30601 • William.seidel@uga.edu • 804-895-4240

WRITING SAMPLE

The attached writing sample is a United States Supreme Court opinion I created for my Writing for Judicial Clerkships class for the Spring 2023 semester. The opinion was written solely by myself and before the release of the actual forthcoming opinion in this case.

Cite as: ____ U. S. ____ (2023)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 22-10

DAVID FOX DUBIN, PETITIONER
v.
UNITED STATES OF AMERICA

22-10

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[April 23, 2023]

PER CURIAM.

I. Opening

The main issue before us is whether, under a federal criminal aggravated identity theft statute, a person meets the elements that he or she “uses” the identity of another person “in relation to” a predicate crime, “without lawful authority,” when that identity is incidental to the underlying crime, and he or she was given permission to use that identity. The United States Court of Appeals for the Fifth Circuit found the statute’s meaning plain, that whenever another person’s identity is used in some relation to a predicate crime, it constitutes the

federal crime of aggravated identity theft. We disagree and reverse, finding that the aggravated identity fraud statute requirements are met only when the use of someone's identity is instrumental to the object of committing the predicate crime, and the use of the identity is done so without permission.

II. Facts and Procedural History

Patient L came to David Dubin's father's psychological services company to receive a psychological examination. Pet'r's Br. 6. This examination is supposed to consist of several tests, including a clinical interview with the patient. Id. The examination for Patient L was completed except for the clinical interview, which was halted, with thirty minutes of the three-hour exam unfinished, by Patient L's father. U.S. Br. 2–3. Dubin was concerned about the ability of Medicare to reimburse the testing because Patient L was already at the limit of mental health testing allowed by Medicare for that 12-month period. Pet'r's Reply Br. 1. To circumvent this, at Dubin's direction, the psychological evaluation was reported to Medicare containing three falsities, including the incorrect date of the exam, the time spent on the exam, and the qualifications of the examiner. J.A. 34–35. As a result, Dubin was found guilty of healthcare fraud under 18 U.S.C. §§ 1347 and 1349. U.S. Br. 4. In addition, Dubin was also found guilty of aggravated identity theft under 18 U.S.C. § 1028A. Id.

The district court judge denied Dubin's motion for acquittal on this aggravated identity theft conviction, stating that, while he hoped to be reversed on the aggravated identity theft issue, he felt bound by circuit precedent. J.A. 39.

A three-judge panel for the Fifth Circuit upheld the conviction, where a lone concurrence by Judge Elrod stated she concurred only because she too felt bound by circuit precedent. Pet'r's Br. 11. A rehearing en banc by the Fifth Circuit upheld the District Court's ruling in a divided opinion. Id. We have granted certiorari to address the meaning of the terms "use," "in relation to," and "without lawful authority," within the aggravated identity theft statute.

III. Standard of Review

The standard of review, in this case, is de novo.

IV. Analysis

A. The terms "use" and "in relation to" are too ambiguous to look solely to their plain meaning and so need to be interpreted with the help of further statutory construction canons.

We first look at the specific language of the statute. 18 U.S.C. § 1028A(a)(1) creates a mandatory two-year minimum sentence for anyone who "during and in relation to any [predicate felony violation], knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person." The term "use" in the case here applies to the use of Patient L's name and Medicaid ID number. The parties agree that Patient L's identifying information meets the definition under 18 U.S.C. § 1028A(d)(7) of the "means of identification" of another person. Precisely how the "means of identification" is required to be *used* to fall within this statute's purview is what is at issue here.

Dubin contends that he did not “use” the identity “in relation to” the predicate felony. The term “use” is not defined in the statute and has many possible definitions; as our precedents have stated, the term “use” is so multifaceted as to require the reading of context to determine its meaning. See Bailey v. United States, 516 U.S. 137, 145 (1995) (discussing how the term use is driven by context); Smith v. United States, 508 U.S. 223, 245 (1993) (Scalia, J., dissenting) (stating that the term use is more sensitive than most to context).

Since we have found “use” is context-dependent, Dubin argues that the term “in relation to” is the key limitation of “use” here. The Government’s position, however, is that “in relation to” means only to further the predicate offense in some way. U.S. Br. 21. The Government heavily relies on our holding in Smith for this definition, but we specifically stated there that “[w]e need not determine the precise contours of the ‘in relation to’ requirement here.” Smith, 508 U.S. at 238. Other precedent found the term “in relation to” put a more restrictive interpretation upon the modified verb. See Muscarello v. United States, 524 U.S. 125, 138 (1998) (finding “in relation to” limits the verb “carry” to specific harms). From this, we gather that neither “use” nor “in relation to” has been so clearly defined in our precedent as to stop us from looking further.

The Government would argue then that the plainness of the language used in §1028A(a)(1) should stop our analysis at the terms themselves because we would be inserting elements that are not found in the statute, but “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the

language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole.” Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). For example, in Yates, we found that a fish was not a tangible object for the purposes of the Sarbanes-Oxley Act. Yates, 574 U.S. at 528. A fish not being considered a tangible object is much more counterintuitive at first glance than what is at issue here, and so in accordance with our precedent, we will look beyond the terms to establish whether they are ambiguous or not.

What we find when reviewing the operative terms through this broader context is that they are not ambiguous when read as a whole and that they create a need for a nexus beyond that of an incidental relationship for the “use” of the identification and the predicate crime. The Government concedes that when the relationship between “use” and the predicate crime is inconsequential, § 1029A(a)(1) does not apply, which is a “but-for” causal standard. We go further than this, finding that a “but-for” cause between the name and the predicate offense is insufficient. To reach this conclusion, we must look at the broader context of the statute.

B. The overarching statutory scheme and title of § 1028A shapes our view that there must be an instrumental relationship between the “use” of the identity and the predicate crime.

Additional interpretative tools when a statute contains vagueness and doubt are appropriate here, such as using the statutory title and broader scheme

to illuminate a statute's meaning. See Yates v. United States, 574 U.S. 528, 552 (2015) (Alito, J., concurring) (looking to the title of a statute to interpret a doubtful term); Bailey v. United States, 516 U.S. 137, 145 (1995) (looking to the statutory scheme to determine the meaning of the term "use"). In fact, we looked at the title of § 1028A previously in Flores-Figueroa v. United States, 556 U.S. 646, 655 (2009), taking note of the word "theft" when construing the statute's meaning. The Government would have us ignore the title, as our precedent states it cannot override the plain meaning of the text, but as we have established above, the meaning of these terms is not clear, and when this is so we may use the title as statutory context to help. Compare Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021) (finding the Court cannot override the plain meaning of the text because of a statute's title), with Flores-Figueroa v. United States, 556 U.S. 646, 655 (2009) (using the title of § 1028A to help determine the statute's ambiguous meaning).

When we take the previous tools into consideration, again we come to a narrower conclusion than the Government's. A statute titled "Aggravated identity theft" does not comport with the broad conduct the Government would criminalize. Take the example of the waiter who overcharges for a bottle of wine on a credit card, who then runs a charge across state lines constituting wire fraud, a § 1028A(c) predicate crime. As the Government stated in its oral argument, this too would fall under their understanding of a violation of the statute. Oral Arg.

63–65. This conduct is a far cry from being conduct labeled aggravated identity theft.

The statutory scheme of § 1028A also does not make sense with the Government’s interpretation. As we said above, to “use” this identification “in relation to” the predicate crime cannot be met sufficiently by only the completion of the predicate crime. Section 1028A is a sentence *enhancement* under the statutory scheme, requiring a mandatory two-year imprisonment to run consecutive to other sentences upon conviction. Sentence enhancements should require a higher level of culpability than merely the simple completion of a predicate crime, especially when there are a vast number of underlying crimes. As Dubin correctly pointed out, “we ‘have traditionally exercised restraint in assessing the reach of a federal criminal statute.’” Marinello v. United States, 138 S.Ct. 1101, 1106 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)). In view of that principle, a narrower view of § 1028A(a)(1) is warranted.

One of the Government’s defenses of this potential overreach of the statute does not hold up to scrutiny. Relying on our decision in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998), the Government contends that statutes often “go beyond the principal evil” for which they are intended. That is true, but the quote in that case goes on to say that is permissible for “comparable evils.” Id. It cannot be said that it is a comparable evil between the waiter who steals a credit card and buys a new tablet, and the waiter who overbills for wine. These acts do not rise to the same level of culpability.

The same is true of Dubin who overbills Medicare but does not create a false claim from no real service rendered. This is a difference of categories, not degrees. Dubin is not lying about who is receiving the services, but rather the form in which those services were provided. It is no different than a butcher with his thumb on the scale. It is fraud, but it is not theft. It is the lie about who is receiving the services that the word “use,” modified by “in relation to,” is aiming to capture. Not how or when but *who*.¹ Made clearer to us by looking at the broader context of the statutory scheme and the title, the use of the identity itself must be wrong for it to meet the “used in relation to” requirement under § 1028A(a)(1).

C. “Without lawful authority” further limits the scope of § 1028A(a)(1) by only pertaining to instances where the identity of a person was used without their permission.

While our understanding of the term “use,” in combination with “in relation to,” puts the conduct of Dubin beyond the reach of § 1028A, the term “without lawful authority” also supports Dubin’s contention that the aggravated identity theft statute does not apply here. The Government would give “without lawful authority” no meaning, as they state that one cannot give lawful authority

¹ See, United States v. Medlock, 792 F.3d 700 (2015) (finding under 18 U.S.C § 1028A that misidentifying how a patient was transported did not constitute “use” of their identification).

to break the law. This understanding would contradict our statutory construction principle that all the terms are presumed to be in the statute with purpose. See United States v. Taylor, 142 S. Ct. 2015, 2024 (2022) (stating that “we do not lightly assume Congress adopts two separate clauses in the same law to perform the same work”). This would violate that principle because if all that “without lawful authority” conveyed was that a predicate offense needs to occur (since one cannot give lawful authority to break the law), then it would render the term meaningless, as that is already in the statute.

In finding that the term “without lawful authority” must then presumptively carry meaning, we now again look to the terms and context of the statute to find its use. As we stated above, that “use” and “in relation to” language goes to the who and not the how of the predicate offence, it follows that “without lawful authority” would go to the permission of the owner of the identification. This makes sense, for example, when there is a scheme between two people to perpetuate a fraud. Imagine if Patient L was receiving a kickback from overbilling of Medicare, and that it was for fictitious services. It would meet our nexus test of falsifying *who* is receiving the benefits, but it still does not look like aggravated identity theft. Why should only the provider be exposed to this two-year charge when both are perpetuating a fraud with the patient’s name? This is where “without lawful authority” adds to the statute’s drive at identity theft in particular. It would bar the above example from using § 1028A(a)(1) because the identity was used with that person’s permission.

We find Dubin’s argument of a parallel between this definition of “without lawful authorization” and that of burglary convincing. It is already illegal to steal but to do so while unauthorized to be on the premises constitutes burglary. It is already illegal to defraud Medicare in a reimbursement claim, which requires a name, but to do so when that name is also unauthorized to be on the reimbursement claim is what we find constitutes “without lawful authority” under § 1028A. Here, because Dubin placed the identifying information of Patient L on the form with his or her permission, then it was not done “without lawful authority.”

D. Constitutional avoidance and the rule of lenity are not appropriate here because there is no ambiguity to be resolved, however, the impact on federalism further sheds light on the likely inaccuracy of the Government’s broad view of 1028A(a)(1).

We do not need to reach the rules of lenity and constitutional avoidance here because the answer to the ambiguities of the statute has been clearly found, but “[t]he fallout underscores the implausibility of the Government’s interpretation.” See Van Buren v. United States, 141 S.Ct. 1648, 1661 (2021) (finding that the term “exceeds authorized use” needed context but was not so vague as to require these canons). If we were to give such a broad reading to this language as the Government suggests, there would be cascading effects between the nature of state and federal law.

When a statute has ambiguities, it is appropriate to consult basic principles of federalism. Bond v. United States, 572 U.S. 844 (2014). If the expansive view of this statute was to be found, whole swaths of what are now state crimes would be jumped up to federal crimes. This is due to 18 U.S.C. § 1028(a)(7), a neighboring statute that uses the same operative language as § 1028A, except that it includes all state and federal felonies as a predicate crime. Where two similar statutes use the same language, we would presumably give that language the same effect. United States v. Davis, 139 S. Ct. 2319, 2329 (2019). If the Government's view of the terms of 18 U.S.C. § 1028A were imputed into 18 U.S.C. § 1028, as they must be if we were to endorse their view in this case today, then, for example, when an individual graffiti's another individual's name onto a wall, if it rises to the level of a state felony, that act would be a federal criminal offense.

This would be a large change to our understanding of federal and state power, and Congress must be explicit to drastically upset the balance of power between the federal government and the states. Cleveland v. United States, 531 U.S. 12, 25 (2000). Congress did not explicitly upset this balance in either §§ 1028 or 1028A. Interests of comity and federalism must weigh heavily then against giving the terms in 18 U.S.C. § 1028A(a)(1) broad meaning when it would result in such sweeping federal overtures into state policing power. This cements our view that the Government's broad interpretation of the terms of § 1028A(a)(1) is incorrect and that the narrower holding we make today regarding these terms reflects a more consistent position within our jurisprudence.

V. Conclusion

For the foregoing reasons, we reverse Dubin's conviction of aggravated identity theft.

Applicant Details

First Name **Christopher**
 Last Name **Seiler**
 Citizenship Status **U. S. Citizen**
 Email Address **ndb3uz@virginia.edu**
 Address

Address**Street****293 Peyton Court Apt 3****City****Charlottesville****State/Territory****Virginia****Zip****22042**

Contact Phone Number **804-767-0711**

Applicant Education

BA/BS From **College of William and Mary**
 Date of BA/BS **May 2014**
 JD/LLB From **University of Virginia School of Law**
<http://www.law.virginia.edu>
 Date of JD/LLB **May 19, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Virginia Law Review**
Virginia Environmental Law Journal
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Livermore, Michael
mlivermore@law.virginia.edu
(434) 982-6224

Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

Jaffe, Caleb
cjaffe@law.virginia.edu
(434) 924-4776

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher D. Seiler

293 Peyton Court Apt. 3, Charlottesville, VA 22903 • (804) 767-0711 • ndb3uz@virginia.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to you to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

I was raised in Virginia and I have spent almost all of my life living, studying, and working in the Commonwealth. I intend to remain in Virginia permanently upon my graduation from law school and would love to begin my legal career with a clerkship in Virginia.

Enclosed please find a copy of my resume and my most recent transcript. I have also enclosed as a writing sample a memorandum that I wrote for an attorney at the Department of Justice last summer, forwarded to you with his and his Section's permission. Finally, included are letters of recommendation from Professor Jaffe (434-924-4776), Professor Barzun (434-924-6454), and Professor Livermore (434-982-6224).

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you very much for considering me.

Sincerely,

Christopher Seiler

Christopher D. Seiler

293 Peyton Ct Apt 3, Charlottesville, VA 22903 • (804) 767-0711 • ndb3uz@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA

J.D., Expected May 2024, 3.69 GPA

- *Virginia Law Review*, Editorial Board
- *Virginia Environmental Law Journal*, Managing Editor
- Program in Law and Public Service, Fellow
- Public Interest Law Association, Distinguished Member
- Environmental Law and Community Engagement Clinic, Fall 2022

Virginia Polytechnic Institute and State University, Blacksburg, VA

M.A., Political Science, May 2020

College of William and Mary, Williamsburg, VA

B.A., International Relations, *summa cum laude*, May 2014

EXPERIENCE

United States Senate Office of the Legislative Counsel, Washington, DC

Law Clerk, May 2023 – July 2023

United States Department of Justice, Civil Division, Washington, DC

Intern, Fraud Section, May 2022 – July 2022

- Drafted memorandum on defective pricing under the Truth in Negotiations Act as a basis for a claim under the False Claims Act
- Researched substantive and procedural issues for ongoing litigation under the False Claims Act including medical necessity, government knowledge defense, and deliberative process privilege

United States Air Force/Air Force Reserve, Multiple Locations

Intelligence Officer, March 2016 – Present

- Leads 35-member unit in conducting multiple intelligence missions and develops training programs to ensure continued readiness over drill weekends
- Directed 18-member analysis team on 782 full motion video intelligence missions and served as the primary full motion video analysis instructor, training nine officers
- Briefed aircrews daily and the Wing Commander weekly on current threats and provided original threat assessments based on research and analysis of multiple classified and unclassified sources
- Served as the interim Chief of Wing Intelligence, ensuring seamless continuation of intelligence support to senior leaders and overseeing 12 members of the Intelligence flight

Arlington Primary Care, Arlington, VA

Data Quality Analyst, August 2014 – March 2016

- Identified, reviewed, and corrected data inconsistencies in patient charts in the electronic medical records system, including adding new information and evaluating information for accuracy

The Stimson Center, Washington, DC

Intern, Budgeting for Foreign Affairs and Defense, January 2014 – August 2014

- Provided research support on the costs of American nuclear weapons programs for an article appearing in *Foreign Affairs*

INTERESTS

Reading history, running, historic and cultural sites (e.g., museums, preserved areas), classic movies

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Christopher Seiler

Date: June 07, 2023

Record ID: ndb3uz

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.**Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.****FALL 2021**

LAW	6000	Civil Procedure	4	A-	Solum, Lawrence
LAW	6002	Contracts	4	B+	Hellman, Deborah
LAW	6003	Criminal Law	3	A-	Jeffries Jr., John C
LAW	6004	Legal Research and Writing I	1	S	Fore Jr., Joe
LAW	6007	Torts	4	A-	Cope, Kevin

SPRING 2022

LAW	6001	Constitutional Law	4	A-	Mahoney, Julia D
LAW	6112	Environmental Law	3	A-	Livermore, Michael A.
LAW	7088	Law and Public Service	3	A-	Kim, Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Fore Jr., Joe
LAW	6006	Property	4	A-	Hynes, Richard M

FALL 2022

LAW	8640	Enviro and Comm Eng Clinic	4	A-	Jaffe, Caleb Adam
LAW	6104	Evidence	4	A-	Barzun, Charles Lowell
LAW	6105	Federal Courts	4	A	Ahdout, Zimra Payvand
LAW	7071	Professional Responsibility	3	B+	Mitchell, Paul Gregory

SPRING 2023

LAW	6102	Administrative Law	4	A-	Bamzai, Aditya
LAW	9341	Law of Corruption	3	A-	Gilbert, Michael
LAW	7062	Legislation	4	A-	Nelson, Caleb E
LAW	9197	Public Utility Reg Seminar	3	A	Gocke, Alison

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Christopher Seiler for a clerkship position in your chambers. Chris was a student in my environmental law course in the spring of 2022. He was a bright and enthusiastic presence in class and wrote a strong and nuanced final paper. In my interactions with Chris both inside and outside of class, I've been particularly impressed with his maturity and work ethic. I am very confident that he would make an excellent clerk.

My environmental law class tends to focus on the interaction of economic, moral, scientific, and political factors with environmental policymaking. I assess students in a variety of ways for this course. Rather than require students to submit a final exam (as is common in environmental law survey courses), I ask them to complete a substantive paper that applies the concepts in the course to a live environmental regulatory or policy question. The goal with this final project is to provide students with an opportunity to engage with legal materials beyond judicial opinions and to gain familiarity with some of the regulatory and administrative materials that are not often found in law school casebooks. In addition to the final project, I assess students on two short midterms, an online discussion forum, and class participation.

Chris came to law school with substantial prior work and educational experience. He completed a master's degree in political science prior to enrolling in law school, and this interest and background informed Chris's perspective on the political factors that influence the creation and implementation of environmental statutes. He also has experience in the U.S. Air Force as an active-duty intelligence officer, a role he continues in the Air Force Reserve. Those positions have afforded Chris multiple leadership opportunities in which his calm, grounded demeanor no doubt served him well.

Chris performed at the top of the class in all aspects of the course: he was an active and productive class participant, his quiz scores demonstrated a mastery of the doctrinal and statutory material covered in the course, and he wrote a very strong final paper. The topic of that paper was the Atlantic Coast Pipeline, a proposed multibillion-dollar natural gas infrastructure project that would have spanned six hundred miles and three states. The project faced stiff opposition from property owners and environmental organizations and was eventually canceled by the developers due to legal difficulties and delays.

Issues around natural gas infrastructure are complicated and often politically and ideologically charged. Chris's paper admirably wades into this fraught terrain with sensitivity to the multiple conflicting perspectives and interests at stake. Large infrastructure projects like the Atlantic Coast Pipeline are also legally, commercially, and financially complex, and Chris developed a nuanced understanding of the social landscape that informed the development, and ultimately the demise, of the project.

I was particularly impressed with Chris's ability to understand the interaction between the purely legal questions implicated by the pipeline—which formed the basis for several lawsuits—and their political, economic, and policy backdrop. In this case, environmental litigation played a major role, with opponents securing several legal victories. But the effects of this litigation cannot be fully understood without reference to these broader social forces. In the most high-profile litigation, the pipeline proponents were successful in the U.S. Supreme Court in a challenge to a permit issued by the National Forest Service that affected a portion of the Appalachian Trail. Chris's paper nicely explains why, notwithstanding that prominent legal success, the pipeline project was ultimately cancelled.

Outside of class, Chris participates in two different journals—a testament to his work ethic, his interest in environmental law, and his willingness to take on unglamorous but useful roles. He has also impressed on me the value that he places on public service. His time in the Air Force was spurred by a desire to make a positive impact on the world, and he has adopted that mindset in his attitude toward the legal profession.

Overall, I believe that Chris would make an excellent clerk. He is a strong writer with a careful approach to understanding legal doctrine. He is also mature, thoughtful, hardworking and thorough—all important qualities in a young lawyer. I'm quite sure that he would be a welcome presence in chambers.

Please let me know if I can provide you with any additional information.

Warm regards,

Michael A. Livermore

Michael Livermore - mlivermore@law.virginia.edu - (434) 982-6224

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend highly Christopher Seiler for a clerkship in your chambers. Chris is a bright young man, who I think would make a terrific clerk in your chambers.

I got to know Chris the fall of his second year when he enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Chris's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That fact meant that I got to know the students more quickly than I normally do. Chris impressed me throughout the semester. Whenever I called on him, he demonstrated that he had done the reading and thought about the problem or case under discussion. I was thus not surprised that he did well on the final exam, earning an A- for the course.

Chris's performance in my classes has been typical of his law-school performance overall. After two years, he has a GPA of 3.69, which places him well within the top 20% of his law-school class. Even more impressive, he has put together that record while throwing himself into the intellectual and extracurricular life of the law school. He is a fellow in the Program in Law and Public Service, a member of the Public Interest Law Association, and works on two journals: He's an Article Editor for the Virginia Environmental Law Journal and is an editorial board member of the Virginia Law Review.

I believe that Chris wants to practice environmental law, ideally working at the EPA or some other regulatory agency. I have every reason to believe he will find success in doing so. Chris is a few years older than most of his classmates, having served in the Air Force for several years after college, and he displays the maturity and intelligence one would expect of someone with such a background. For those reasons, I think he will make a great judicial clerk. Still, if you have any questions about Chris, or would like to discuss his candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

Charles Barzun - cbarzun@law.virginia.edu - (434) 924-6454

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to offer my very enthusiastic recommendation for Chris Seiler, who has applied for a clerkship in your chambers. I met Chris when he was a first-year law student, after he reached out to me to learn about career paths in environmental law. I was immediately struck by his maturity, focus, and humility. We enjoyed several productive discussions during Chris's 1L year, conversing about his public-interest aspirations and covering environmental law and policy topics more generally.

I came to know Chris much better after he applied to join the Environmental Law and Community Engagement Clinic for the Fall 2022 semester. Chris immediately stood out as a thoughtful, team-oriented member of the Clinic. He especially excelled on projects with the Southern Environmental Law Center ("SELC"), a longstanding partner of the UVA Clinic. The students I select to work on SELC projects need to be independent and self-motivated. Chris was a perfect fit for that kind of work. Given his experience as an intelligence officer for the U.S. Air Force, Chris was unquestionably ready to assume many of the responsibilities of a lawyer. Simply put, Chris needs less day-to-day oversight than is often required of his peers.

Over the course of the Fall 2022 semester, Chris proved to be one of the strongest researchers and writers in the Clinic. He completed several complex assignments across a broad range of cases: federal and state takings jurisprudence as it applied to abandoned public property; state constitutional questions on mining law; and a multi-state survey of legal regimes on low carbon fuel standards. Without fail, Chris's memos were carefully researched, thoughtfully presented, well-written, and clearly argued. The attorneys at SELC who worked directly with Chris shared with me that they had immense confidence in the quality of Chris's work.

I should add that Chris was a stellar contributor during the seminar portion of our Clinic, when we would discuss all of the students' projects in addition to debating the supplemental readings that I would assign. Chris was a steady contributor and respectful listener during these sessions.

And Chris' star continues to rise. He earned an impressive 3.76 GPA in the Spring 2023 term, while continuing to manage his responsibilities both for the Virginia Law Review and the Virginia Environmental Law Journal.

If I had to come up with one word to describe Chris, it would be "unflappable." Chris carries himself calmly and acts patiently. He is kind and gracious. Because of these traits, I have no doubt that he would be an excellent colleague to have in chambers. I would hire him in a minute.

Sincerely,

Cale Jaffe
Professor of Law, General Faculty
Director, Environmental Law & Community Engagement Clinic

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

Christopher D. Seiler

293 Peyton Ct Apt 3, Charlottesville, VA 22903 • (804) 767-0711 • ndb3uz@virginia.edu

Writing Sample

This writing sample is a memorandum that I wrote during my summer internship in the Fraud Section, Civil Division. In this memorandum, I respond to an attorney's question as to whether and how a false certification under the Truth in Negotiations Act can serve as the basis for an action under the False Claims Act. This writing sample is my own work product and has not been substantially edited by any other person. I received permission from the Fraud Section and the supervising attorney to use this piece as a writing sample.

- 2 -

MEMORANDUM

TO: Art Coulter
Senior Trial Counsel
Fraud Section

FROM: Chris Seiler
Intern
Fraud Section

RE: TINA Violations and FCA Liability

I. TINA and the FCA establish liability for certain fraudulent behaviors while contracting with the government

A. TINA requires contractors to certify that their cost and pricing data is accurate

Contractors that provide defective cost or pricing data to the government may be liable for price adjustments to contracts made based on the defective data. The Truthful Cost or Pricing Data Act, also known by its former name, the Truth in Negotiations Act (TINA), defines “cost or pricing data” as “all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly.” 10 U.S.C. § 3701.¹ “Cost or pricing data” does not include information that is judgmental, but it does include the “factual information from which a judgment was derived.” *Id.* Cost or pricing data includes historical accounting data, vendor quotations, nonrecurring costs, information on changes in production methods and in production or purchasing volume, data underlying projections of business prospects and objectives, unit-cost trends, make-or-buy decisions, and information on management decisions that could have a significant bearing on costs. 48 C.F.R. § 2.101. One court held that eight months’ worth of performance data at a facility to which a contractor was moving production that demonstrated the workforce there was more efficient than projected and thus the number of required labor hours was inflated constituted cost or pricing data. *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324, 1335 (M.D. Fla. 2003).

Under TINA, contractors must “certify that, to the best of the [contractor]’s knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.” 10 U.S.C. § 3702(b). Thus, defective cost or pricing data is that which is “inaccurate, incomplete, or noncurrent.” 10 U.S.C. § 3706(a)(2). Contracts “shall be adjusted to exclude any significant amount” by which the price was increased because a contractor submitted defective cost or

¹ Formerly 10 U.S.C. § 2306a, TINA’s provision were transferred to 10 U.S.C. §§ 3701–3708 effective January 1, 2022, and § 2306a was repealed. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1831, 134 Stat. 3388, 4209–17 (2021). TINA also includes 41 U.S.C. §§ 3501–3509, which features similar language and applies more broadly than the provisions in Title 10 that are specific to the armed forces.

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pricing data. 10 U.S.C. § 3706(a)(1). This verbiage is repeated verbatim in 41 U.S.C. §§ 3501(a)(1), 3502(b), 3506(a)(2), and 3506(a)(1), respectively. The requirement to provide cost or pricing data and the accompanying certifications to their accuracy are required before a contract is awarded if the price of the contract is expected to exceed \$2,000,000, or \$750,000 if the contract was entered into on or before June 30, 2018. 10 U.S.C. § 3702(a)(1); 41 U.S.C. § 3502(a)(1).²

1. The government has the burden of proof and must demonstrate cost or pricing data was not disclosed and the government detrimentally relied upon defective data

The government has the burden of proof in a defective pricing case, and it must prove by a preponderance of the evidence that: (1) the information at issue is “cost or pricing data” under TINA; (2) the cost or pricing data was not disclosed, or was not meaningfully disclosed,³ to a proper government representative; and (3) the government detrimentally relied on the defective data and shows by some reasonable method the amount by which the final negotiated amount was overstated. *Campbell*, 282 F. Supp. 2d at 1332 (quoting *United States v. United Techs. Corp.*, *Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167, 189 (D. Conn. 1999)). Once it is determined that a contractor provided defective data, there is a rebuttable presumption that the non-disclosure of data resulted in an overstatement of the price of the contract. *Wynne v. United Techs. Corp.*, 463 F.3d 1261, 1263 (Fed. Cir. 2006). If that presumption is rebutted, “the government can only prevail upon proof that it relied upon the defective data to its detriment in agreeing to the contract price.” *Id.* Additionally, the government can receive double damages if it shows the submission of defective data was a “knowing submission.” 10 U.S.C. § 3707(a)(2); 41 U.S.C. § 3507(a)(2).

B. The FCA provides punitive measures for false claims for payment and false statements material to false claims

The False Claims Act (FCA) provides penalties for any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,” 31 U.S.C. § 3729(a)(1)(A), or who “knowingly makes, uses, or causes to be made or used, a false record or

² Congress claimed that the higher thresholds for certified cost and pricing data will reduce administrative burdens, improve process timelines for smaller contracts, and make thresholds approximately consistent with standard auditing thresholds. H.R. Rep. No. 115-200, at 163 (2017). Additionally, legislation introduced in June 2022 would, among other things, amend 10 U.S.C. § 3702(a)(1) to expand the requirement to submit cost or pricing data from instances in which only one bid is expected to also include instances “for which award of a cost-reimbursement contract is contemplated regardless of the number of offers received.” Stop Price Gouging the Military Act, S. 4374, 117th Cong. § 2(a) (2022).

³ “A determination of whether a data disclosure was meaningful depends on the application of a ‘rule of reason’ to the circumstances of each case to determine whether the data was conveyed to the Government in a reasonably meaningful fashion.” *Aerojet Ordnance Tennessee*, ASBCA No. 36089, 95-2 B.C.A. ¶ 27,922 at 139,437 (quoting *Plessey Industries*, ASBCA No. 16720, 74-1 B.C.A. ¶ 10,603). Put differently, the government must show the data was not provided in a “usable, understandable format” to the proper government representative. *Id.* (citing *Litton Sys., Inc., Amecom Div.*, ASBCA No. 36509, 92-2 B.C.A. ¶ 24842); see also *Sylvania Elec. Prod., Inc. v. United States*, 479 F.2d 1342, 1348 (Ct. Cl. 1973) (stating that TINA can only be effective if the government is “clearly and fully informed” which requires “complete disclosure of the item or items in question”).

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statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(B). Violations of the FCA result in a civil penalty plus treble damages. 31 U.S.C. § 3729(a)(1).

1. The FCA defines know, claim, and material but not false or fraudulent

The FCA defines “know” and “knowingly” as, with respect to information, “has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information.” 31 U.S.C. § 3729(b)(1)(A). Knowledge requires no proof of a specific intent to defraud the government. 31 U.S.C. § 3729(b)(1)(B). A “claim” under the FCA is “any request or demand . . . for money or property” that is “presented to an officer, employee, or agent of the United States” or is “made to a contractor, grantee, or other recipient” if the money or property is to be used on behalf of the government. 31 U.S.C. § 3729(b)(2)(A). Finally, “material” is defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). The text of the FCA does not define “false” or “fraudulent” but the Supreme Court interprets those terms under their “well-settled” common-law meanings. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016).

2. The government has the burden of proof and must show falsity, scienter, and materiality

The elements that must be shown in an FCA case may differ slightly depending on whether the case is brought under Section 3729(a)(1)(A) or 3729(a)(1)(B). In a presentment case under Section 3729(a)(1)(A), the government, or a relator in a *qui tam* suit, must show “(1) the defendant submitted or caused to be submitted a claim to the government, (2) the claim was false, and (3) the defendant knew the claim was false.” *United States ex rel. Groat v. Bos. Heart Diagnostics Corp.*, 255 F. Supp. 3d 13, 21 (D.D.C.), *amended on reconsideration in part*, 296 F. Supp. 3d 155 (D.D.C. 2017). In a false statements case under 3729(a)(1)(B), it must be shown that “(1) the defendant made or used [or caused to be made or used] a ‘record or statement;’ (2) the record or statement was false; (3) the defendant knew it to be false; and (4) the record or statement was ‘material’ to a false or fraudulent claim.” *Id.* at 30. Thus, cases brought under both Sections require a showing of a false claim or statement known by the defendant to be false. False statement cases also require a showing of materiality. The common law proximate causation test is used for determining liability and damages in FCA cases. *See, e.g., United States v. Luce*, 873 F.3d 999 (7th Cir. 2017).

3. Several circuits have adopted a threshold scienter requirement from *Safeco*

To date, six circuits have held that the Supreme Court’s interpretation of the Fair Credit Reporting Act’s (FCRA) scienter requirement in *Safeco* applies to the FCA. *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 347 (4th Cir. 2022) (citing *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007) as well as cases from the Third, Seventh, Eighth, Ninth, and D.C. Circuits), *reh’g en banc granted*, No. 20-2330, 2022 WL 1467710 (4th Cir. May 10, 2022). *Safeco* created a two-step process for analyzing reckless disregard: first,

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determining whether the defendant's interpretation of the relevant statute was objectively reasonable and then asking whether determinative guidance exists that might have warned the defendant away from its interpretation. *Id.* Thus, a defendant cannot act "knowingly" if it "bases its actions on an objectively reasonable interpretation of the relevant statute when it has not been warned away from that interpretation by authoritative guidance." *Id.* at 348. This objective standard also precludes inquiry into a defendant's subjective intent. *Id.* However, *Safeco* only applies to legally false claims, which "generally require knowingly false certification of compliance with a regulation or contractual provision as a condition of payment" and "involve contested statutory and regulatory requirements." *Id.* at 349–50 (contrasting legally false claims with factually false ones, such as those involving incorrect descriptions of goods or services or claims for goods or services not provided).

4. Materiality is generally required in an FCA case

31 U.S.C. § 3729(a)(1)(B) requires that the false record or statement be "material" to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B). Although the text of § 3729(a)(1)(A) does not mention materiality, the Supreme Court has held that, regarding that section, what matters is "whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Escobar*, 579 U.S. at 181, 193 (declining to decide whether "§ 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law"). Thus, many courts require proof that knowingly false claims be material to the government's payment decision for an FCA claim to succeed, especially following *Escobar*. See, e.g., *United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 307 (1st Cir. 2010); *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 86 n.5 (2d Cir. 2012) (noting the Second Circuit had not required a showing of materiality prior to a 2009 amendment to the FCA that added the materiality language to § 3729(a)(1)(B) and imposing that requirement on § 3729(a)(1)(A)); *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455, 463 (7th Cir. 2021).

II. TINA violations can serve as the basis of an FCA claim

TINA and the FCA both involve misrepresentations made to the government, although the burdens of proof differ between the two. TINA requires a showing that cost or pricing data was not disclosed, or was not meaningfully disclosed, and that the government relied on the defective data. The government also may need to show causation if the contractor offers evidence the government did not rely on the defective data. See, e.g., *Campbell*, 282 F. Supp. 2d at 1332. Under the FCA, there must be an objective falsehood and there is a scienter requirement. False statements cases also have a materiality requirement.

A. A knowingly false TINA certification could provide the basis for an FCA claim

A TINA violation could serve as the basis of an FCA claim if a contractor knowingly submits a false TINA certification (one certifying cost or pricing data that is known to be defective) and the certification is material to a claim for payment such as in the negotiated

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contract. *See United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 623 (6th Cir. 2006) (citing *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998)) (noting an omission of pertinent cost and pricing data would violate TINA and a cause of action would exist under the FCA because the contractors “submitted claims for payment despite knowledge of their non-compliance with all contractual provisions and applicable statutes”), *rev’d on other grounds*, 553 U.S. 662 (2008); *United States ex rel. Watkins v. KBR, Inc.*, 106 F. Supp. 3d 946, 955 (C.D. Ill. 2015) (stating the FCA allegation must “connect the alleged violation of TINA . . . to the allegedly false statement made by Defendants to get a submitted claim paid”).

However, it must be shown that in making the TINA certification, the contractor “made a statement in order to receive money from the government.” *Watkins*, 106 F. Supp. 3d at 956. In other words, FCA liability based on a regulatory violation requires a contractor to falsely certify its regulatory compliance “*in making its claim for payment*” and therefore false general certifications may not be material to the government’s decision to pay the claims. *Id.* (emphasis in original) (citing *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818 (7th Cir. 2011)). Thus, where a contractor does not provide false certifications with invoices or vouchers submitted to the government, there may be no statement made to receive money from the government; general TINA certifications at the time of contract formation may be “too remotely connected to the obtainment of payment under the [contract] to incur liability under the FCA.” *Id.* at 957.

1. The government must first show a TINA violation occurred

For a TINA violation to serve as the basis for an FCA claim, it must first be shown that there was a TINA violation. The allegedly false statement must involve (1) cost or pricing data that (2) is not disclosed or is not meaningfully disclosed and (3) influences the government’s decision. *Watkins*, 106 F. Supp. 3d at 958–60 (analyzing whether a bid analysis constituted cost and pricing data and whether disclosure would have influenced the government’s decision to finalize the contract at issue); *cf. United States ex rel. Rille v. Sun Microsystems, Inc.*, No. 4:04-CV-00986-BRW, 2012 WL 260755, at *3 (E.D. Ark. Jan. 30, 2012) (citing *United States v. JT Const. Co.*, 668 F. Supp. 592, 593 (W.D. Tex. 1987)) (requiring “that the contractor acted with the requisite intent” in place of influencing the government’s decision).

Where there is no violation of TINA, that statute cannot serve as the basis of an FCA claim. In *Sanders*, the court found the subcontractor defendants did not violate TINA because they had only preliminary plans to negotiate a lower price for the equipment at issue at the time they reached an agreement on price with the prime contractor. *Sanders*, 471 F.3d at 625. Additionally, the defendants had no duty to disclose the agreement that did lower the price because it came thirteen months after the agreement with the prime contractor. *Id.* Without a TINA violation, there was no cause of action under the FCA and summary judgment was appropriate on that issue. *Id.* at 626.

2. The government must satisfy the FCA’s scienter requirement

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To succeed on an FCA claim, the government must show that the contractor acted with the requisite knowledge in falsely certifying its adherence to TINA and its regulations. *See Sikorsky*, 51 F. Supp. 2d at 197–99 (contractor admitted to TINA violation but court found government had not shown requisite scienter for an FCA claim). The government must prove by a preponderance of the evidence that the contractor knowingly presented a false claim to the government or that it knowingly made a false statement to get a claim it knew was false paid or approved. *Id.* at 196. As defined in the text of the statute, actual knowledge as well as reckless disregard of the falsity of information are sufficient to meet the FCA’s scienter requirement. 31 U.S.C. § 3729(b)(1)(A); *see also United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (noting “honest mistakes or incorrect claims submitted through mere negligence” are insufficient to satisfy scienter).

The *Safeco* standard adopted by several circuits also establishes an objectively reasonable threshold for legally false claims. *See, e.g., Schutte*, 9 F.4th at 468. Thus, for a TINA claim to also satisfy the FCA’s scienter requirement, the government would need to show that the contractor acted with at least reckless disregard toward the false claims or statements it made. In circuits that have adopted the *Safeco* standard, the government would need to show that the contractor lacked an objectively reasonable interpretation of TINA or an applicable Federal Acquisition Regulation, or that there was guidance that would have warned the contractor away from its reasonable interpretation. *Id.*

Showing a contractor had knowledge that its claims were false are crucial to an FCA claim, as “it is the defendant’s knowledge of the falsity of its claim that is the statutory basis for a claim under the False Claims Act.” *Sikorsky*, 51 F. Supp. 2d at 196. In *Sikorsky*, a contractor admitted to violating TINA with respect to certain goods; nevertheless, it argued that neither its TINA certificate nor any of its claims were knowingly false or fraudulent. *Id.* The government argued that the court’s analysis on the scienter issue should be based on the contractor’s corporate knowledge so that it only needed to show that one employee had actual knowledge of the contractor’s conduct and its duty to report accurate data to the government. *Id.* The court rejected the collective corporate knowledge doctrine and found that the government failed to show that certain employees had any knowledge that representations made in the certificate were false or acted in reckless disregard as to the truth or falsity of the certificate. *Id.* at 199. In *Campbell*, the court established that the defendant should have disclosed labor data that constituted cost or pricing data under TINA; the court denied the defendant’s motion for summary judgment on the government’s FCA claims in part because the defendant presented claims for payment despite knowing they did not reflect accurate labor data. *Campbell*, 282 F. Supp. 2d at 1342.

The government’s burden in showing the contractor had knowledge its claims or statements were false is lower at the motion to dismiss stage, where knowledge must only be adequately plead. One court denied a contractor’s motion to dismiss where the government adequately alleged it failed to disclose pertinent cost and pricing data when it was requested during negotiations. *United States ex rel. Woodlee v. Sci. Applications Int’l Corp.*, No. SA-02-CA-028-WWJ, 2005 WL 729684, at *4 (W.D. Tex. Feb. 4, 2005). The government adequately

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alleged the contractor perpetrated a “scheme to fraudulently inflate its profits” by knowingly concealing data from government contract negotiators. *Id.* at *2. In another case, the government adequately alleged the contractor acted knowingly by preparing an updated bill of materials but did not disclose the costs therein to the government because it was afraid the costs would result in a lower-priced contract. *United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-12225, 2016 WL 894567, at *3 (E.D. Mich. Mar. 9, 2016). The government further adequately alleged that the contractor’s failure to disclose those costs meant that the contractor provided a TINA certification while knowing its cost or pricing data was defective. *Id.*

Applicant Details

First Name	Zachary
Middle Initial	C
Last Name	Semple
Citizenship Status	U. S. Citizen
Email Address	zs258@georgetown.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>130 M Street Apt. #808</div> <div>City</div> <div>zs258</div> <div>State/Territory</div> <div>District of Columbia</div> <div>Zip</div> <div>20002</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	19784603916

Applicant Education

BA/BS From	George Washington University
Date of BA/BS	May 2018
JD/LLB From	Georgetown University Law Center
	https://www.nalplawschools.org/employer_profile?FormID=961
Date of JD/LLB	May 19, 2024
Class Rank	School does not rank
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	Yes
Moot Court Name(s)	The Beaudry Moot Court Competition
	Evans Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

DeLaurentis, Frances
frances.delaurentis@law.georgetown.edu
Bove, Marcia
bove.marcia@dol.gov
(202) 693-5598

Gottesman, Michael
gottesma@law.georgetown.edu
202-662-9482

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ZACHARY SEMPLE

130 M St. NE Washington, DC 20002 | (978) 460-3916 | zs258@georgetown.edu

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Georgetown University Law Center and a member of Georgetown Journal of Legal Ethics. I am writing to apply for a 2024 clerkship in your chambers. I am particularly interested in clerking for you given your work for the Department of Justice in the Eastern District of Virginia.

I will use the skills I gain from a clerkship within your chambers to pursue a public service career. Throughout my professional life I have remained steadfast in my plan to use the law to create a more equitable society. I chose to spend this summer working for the Department of Justice's (DoJ) Summer Legal Intern Program (SLIP) rather than for a law firm because I know I have a responsibility to use the legal education I have received to help others. After completing a clerkship, I similarly plan to apply to both the DoJ Honors Program and Department of Labor (DoL) Honors Program.

Furthermore, throughout my legal education, I have sought out challenging courses and internships to improve my legal skills. I completed courses in administrative law and complex litigation to prepare to face the complicated procedural questions I will encounter during my legal career. Additionally, next semester I will complete Federal Courts to ensure I develop a robust understanding of the jurisdictional issues the federal judiciary faces. Likewise, recognizing the importance of strong legal research and writing skills, I have secured substantive writing opportunities for every semester of my education. During the fall and spring semesters of my second year I participated in writing-intensive internships. I will enroll in an upper-level writing course for the first semester of my third year. I will also participate in the Appellate Courts Immersion Clinic during the second semester of my third year. There, I will work full-time for the clinic writing briefs filed in Federal Circuit courts across the country. Through these experiences, I have leveraged every opportunity available in law school to affect radical improvements to my legal skills.

I have enclosed my resume, law school transcript, and a writing sample. MY letters of recommendation from Professor Michael Gottesman, Professor Frances DeLaurentis, and Senior DoL Trial Attorney Marcia Bove. are also enclosed. If you have any questions, I can be reached at zs258@georgetown.edu, or at 978-460-3916. Thank you for reviewing my application.

Best,
Zach Semple

ZACHARY SEMPLE

130 M St. NE Apt 808, Washington, DC 20002 • (978) 460-3916 • zs258@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER

Washington, DC

Juris Doctor | GPA: 3.88 (Top 10% of class)

Expected May 2024

Activities: Public Interest Fellow, Barristers' Council Appellate Advocacy Division,
Georgetown Journal of Legal Ethics, Appellate Courts Immersion Clinic (Spring 2024)

Awards and Honors: Beaudry Competition "Best Brief," Dean's List, Evans Moot Court Competition Quarterfinalist

GEORGE WASHINGTON UNIVERSITY

Washington, DC

Bachelor of Arts, *cum laude*, in International Affairs

May 2018

Honors: University Honors Program

Activities: Ultimate Frisbee Team, Delta Tau Delta, Residence Hall Association

Thesis: *Subnational Corruption and its Impact on the Informal Sector of Mexico*

EXPERIENCE

DEPARTMENT OF JUSTICE, CIVIL DIVISION, COMMERCIAL LITIGATION BRANCH Washington, DC

Summer Legal Intern Program

May 2023 – July 2023

- Participated in mooting various motions hearings
- Completed memorandum on a wide variety of issues including administrative law, civil procedure, and the intersection of cryptocurrency property rights and bankruptcy law

DEPARTMENT OF JUSTICE, CIVIL DIVISION, CONSUMER PROTECTION BRANCH Washington, DC

Volunteer Intern

Jan. 2023 – May 2023

- Reviewed thousands of documents to support case team's criminal prosecution of fraud
- Researched complex legal issues such as criminal venue laws and the Alternative Fines Act

CHAMBERS OF THE HONORABLE DISTRICT JUDGE COLLEEN KOLLAR-KOTELLY Washington, DC

Judicial Intern, United States District Court, District of Columbia

Aug. 2022 – Dec. 2022

- Completed legal memorandum on various topics including criminal contempt, labor law, employment law, contract law, and constitutional law

DEPARTMENT OF LABOR, OFFICE OF THE SOLICITOR

Washington, DC

Student Volunteer Intern, Plan Benefits Security Division (PBSD)

May 2022 – Aug. 2022

- Received the Gary S. Tell ERISA Litigation Scholarship
- Conducted research and generated memorandum on ERISA, parity law, and common interest agreements
- Reviewed complex insurance documents to investigate compliance with the Mental Health Parity and Addiction Equity Act of 2008

THE AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM)

Rockville, MD

Coordinator, Specialist, Manager of State Advocacy and Government Relations

Feb. 2019 – Aug. 2021

- Promoted from Coordinator to Specialist to Manager in less than two years
- Authored comment letters, media pieces, testimony, and legislation to advance ASAM's advocacy priorities
- Supported ASAM's regulatory advocacy, including its response to the 2020 Medicare Physician Fee Schedule

THE MISSOURI DEMOCRATIC PARTY COORDINATED CAMPAIGN

Independence, MO

Field Organizer

May 2018 – Nov. 2018

- Led a field office that broke the record for attempted voter contacts in Independence, Missouri

SKILLS

Technical: PACER, Microsoft Office Suite, Relativity, WestLaw, Lexis

Soft Skills: Active listening, communication, fastidiousness, legal research and writing, time management

INTERESTS

Hobbies: Reading, exploring D.C., playing boardgames, walking with my dog

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Zachary Semple
GUID: 832787715

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	001	95	Civil Procedure David Vladeck	4.00	B+	13.32	
LAWJ	002	51	Contracts Michael Diamond	4.00	A	16.00	
LAWJ	003	51	Criminal Justice Michael Gottesman	4.00	A	16.00	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	45.32	3.78
Cumulative	12.00	12.00	45.32	3.78

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2022 -----							
LAWJ	004	95	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	A-	14.68	
LAWJ	007	95	Property John Byrne	4.00	A	16.00	
LAWJ	008	95	Torts Kevin Tobia	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A	12.00	
LAWJ	611	13	Questioning Witnesses In and Out of Court Michael Williams	1.00	P	0.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	68.37	3.80
Annual	31.00	30.00	113.69	3.79
Cumulative	31.00	30.00	113.69	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2022 -----							
LAWJ	1098	05	Complex Litigation Maria Glover	4.00	A	16.00	
LAWJ	1491	07	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	133	~Fieldwork 3cr Deborah Carroll	3.00	P	0.00	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A+	17.32	
LAWJ	263	09	Employment Law Brishen Rogers	3.00	A	12.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	15.00	12.00	48.99	4.08
Cumulative	46.00	42.00	162.68	3.87

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2023 -----							
LAWJ	1492	14	Externship II Seminar (J.D. Externship Program)		NG		
LAWJ	1492	83	~Seminar	1.00	A-	3.67	
LAWJ	1492	85	~Fieldwork 3cr	3.00	P	0.00	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	351	08	Trial Practice	2.00	A-	7.34	
LAWJ	361	08	Professional Responsibility	2.00	A	8.00	
----- Transcript Totals -----							
			EHrs	QHrs	QPts	GPA	
Current			12.00	9.00	35.01	3.89	
Annual			27.00	21.00	84.00	4.00	
Cumulative			58.00	51.00	197.69	3.88	
----- End of Juris Doctor Record -----							

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend enthusiastically Mr. Zachary Semple for a judicial clerkship with your chambers. Mr. Semple was as student in my year-long required Legal Practice: Writing and Analysis course during the 2021-22 academic year. As such, I had the privilege of working closely with him in my intensive writing class, meeting with him several times, and reviewing his writing on numerous occasions. This academic year, I have had the opportunity to meet with Mr. Semple a few times to discuss his academic progress and career plans. Each time I meet with Mr. Semple, I am struck by his intense engagement with the law, his keen intellect, and his strong work ethic. As described more fully below, Mr. Semple would be a welcome addition and asset to your chambers.

Mr. Semple has impressed me as an intellectually curious young man who constantly seeks to learn, improve and hone his craft. He is someone who seems to really love the law; he loves reading about the law, thinking about the law, and engaging with legal questions of great import. At the same time, he recognizes the role that law plays in society and in the daily lives of citizens. Thus, his engagement with the law is not purely intellectual; he is willing to grapple with the real life consequences of legal decisions.

As with many first-year students, the transition from academic prose and policy writing to the more analytical, concise style of legal writing was initially challenging for Mr. Semple. He also struggled initially to confine himself to the precise legal question posed rather than analyzing every tangential issue raised by a fact pattern. His very detailed focus often caused him to notice small nuances in fact patterns that were unintentional but led to vastly different outcomes. In his excitement, he had a tendency to overthink and unduly complicate issues. As the semester progressed, he continued to ask insightful questions but respected set boundaries and answers. As he learned to harness his enthusiasm, he also devoted himself to improving his writing by seeking feedback and writing numerous drafts. During the fall semester of the Legal Practice course, students are required to conduct extensive research and draft at least two predictive office memoranda. In the spring semester, students write a draft and revised appellate brief on two issues of constitutional law. At the end of each semester, students complete a take-home examination that requires them to conduct independent research and draft a predictive memo in the fall, and a persuasive brief in the spring. Mr. Semple's basic writing skills were strong from the outset; likewise, he had strong research skills. His ability to set forth a detailed analytical paradigm grounded in the law and incorporating legal reasoning developed over the course of the year as he took advantage of all of the writing opportunities to improve his analysis and legal writing. In the spring, he embraced the switch to persuasive writing. He earned a grade of A- in my class. Perhaps even more reflective of his strong persuasive writing is the fact that his brief in the first year moot court Beaudry Competition was honored as the Best Brief. Mr. Semple's strong performance in my class is not an aberration as evident from his high G.P.A. of 3.87.

Given his love for the law, Mr. Semple has embraced law school and the opportunities it offers. He is a member of the *Georgetown Journal of Legal Ethics*, a member of the Barristers' Council Appellate Advocacy Division, and was a quarterfinalist in the Evan Moot Court Competition. Mr. Semple is also a Public Interest Fellow. Next year, he will serve as a student attorney in Georgetown's Appellate Courts Immersion Clinic. Whether in class, an extracurricular activity, or at an internship, Mr. Semple is always thinking about the law. By way of example, he recently stopped by my office to tell me of an interesting project he had at his current internship with the Department of Justice and explain why he thought the legal question posed in his current project would make an interesting assignment for my 1L students. Unlike other students who, at most, would mention the project, Mr. Semple arrived with materials to help educate me. Cognizant of his ethical duties, he did not share with me the memo he created for his supervising attorney at the DOJ. Instead, he created a memo that addressed the legal issue only, including the relevant statute and key cases.

As a student, Mr. Semple demonstrated that he is incredibly hard-working and bright; he sees the big picture without losing sight of the smallest of details, and he has a firm grasp of the legal issues presented by the various assignments. He has shown strong analytical and research skills, as well as an understanding of both the legal writing process and the elements that distinguish great legal writing from mediocre writing. His work product has been consistently strong, his contributions to class discussions were insightful and thoughtful; and his numerous interactions with me were engaging and professional. When he came to my office hours, he was always prepared with questions and an open mind.

Moreover, Mr. Semple views the law as a tool to help others. As evident from his resume, Mr. Semple is someone who is committed to public service and intends to pursue a career in public service. He has been so steadfast in his commitment to public service that he chose not to participate in the On Campus Interview program for law firms. Instead, he has sought opportunities to hone his legal skills through public service. He gained valuable experience this past fall as a judicial intern for the Honorable United States District Court Judge Collen Kollar-Kotelly, District of Columbia, and as a summer intern with the Office of the Solicitor at the U.S. Department of Labor. This spring semester he is interning with the U.S. Department of Justice, Civil

Frances DeLaurentis - frances.delarentis@law.georgetown.edu

Division, Consumer Protection Branch. This coming summer, he will participate in the Department of Justice's Summer Legal Intern Program, working in the Civil Division, Commercial Litigation Branch. Long term, he is particularly interested in government service that will help advance the rights of workers while pushing back on the accumulation of power by corporations.

Equally as important, Mr. Semple is a thoughtful, caring and genuine person. He works well independently as well as collaboratively, always seeking to be inclusive. He treats all he encounters with dignity and kindness. He has an upbeat personality and generally wears a smile on his face. He is someone who would enhance and brighten any workplace. I obviously have a high opinion of Mr. Semple and recommend him for a clerkship position. Please do not hesitate to contact me if I can be of any further assistance to you in this process.

Sincerely,

Frances C. DeLaurentis
Professor of Law, Legal Practice

Frances DeLaurentis - frances.delaurentis@law.georgetown.edu

U.S. Department of Labor

Office of the Solicitor
Washington, DC 20210



April 20, 2023

Dear Judge,

I am writing this letter to support Zachary Semple's judicial clerkship application. Mr. Semple worked as a law clerk in our office, the Plan Benefits Security Division ("PBSD"), Office of the Solicitor, U.S. Department of Labor, during the summer of 2022. PBSD prosecutes claims arising under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

Mr. Semple is intelligent, capable, and conscientious. He worked quickly and was extremely productive. I was able to assign complex issues to him that I generally would not have assigned to a law student. His written work was consistently well organized, thorough, and accurate. Mr. Semple is self-directed, flexible, and professional. This was evident in his ability and willingness to tackle factually and legally complex projects with optimism and tolerance for the divergent approaches of other team members. All of the attorneys with whom he worked were impressed by his competence and ability to contribute to the cohesiveness and quality of a team's overall product.

Mr. Semple worked closely with me on a complex investigation being developed by multiple regional offices. I asked him, and other team members, to review subpoenaed data and prepare draft deposition questions based upon that material. He quickly and accurately analyzed voluminous material and prepared questions that, in coordination with other team members, comprehensively addressed the relevant issues.

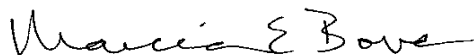
Mr. Semple had significant professional experience before attending law school that enhanced his ability to organize, participate in, and accurately address complex communications during meetings and other interactions involving multiple parties. He is a quick and accurate auditory learner. We relied upon him to organize and lead a significant meeting with public and private healthcare stakeholders. He identified topics and drafted questions. His nuanced questions demonstrated that he understood the Department's goals for the meeting as well as the stakeholders' viewpoints. In a post-meeting discussion, he creatively identified numerous potential legal strategies to address stakeholder comments and concerns.

Among other assignments, Mr. Semple reviewed precedent in all state and federal court jurisdictions to analyze treatment of medical necessity guidelines in individual Mental Health Parity and Addiction Equity Act ("MHPAEA") cases. He drafted a well-written, thorough, and concise memorandum that synthesized precedent in each jurisdiction to identify variation in how these jurisdictions analyzed MHPAEA claims. Nearly a year later, the Department continues to rely on his analysis.

Mr. Semple made a significant contribution to the work of our office. He was professional, efficient, and courteous at all times. We were fortunate to have him at a time when his prior experience with state and federal healthcare and insurance regulations was particularly important to our work.

Although I have not found a consistent correlation between a high cumulative GPA and the ability to perform a broad range of legal tasks, Mr. Semple's high GPA is indicative of all an employer could reasonably expect. Please contact me or Melissa Moore, Counsel for Health Investigations and Compliance, at (202) 693-5282 or Moore.Melissa@dol.gov, if we can provide any additional information.

Very truly yours,



Marcia E. Bove
Senior Trial Attorney
Plan Benefits Security Division
(202) 693-5598
bove.marcia@dol.gov

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Zachary Semple is one of the most impressive students I've taught in the past two years. He will make a superb judicial law clerk.

Zach was a student in two of my courses: Criminal Justice in his first year (a course that covers the constitutional principles governing interaction between citizens and law enforcement – the Fourth and Fifth Amendments), and Evidence in his second year. He was a star in both classes.

Zach was a frequent contributor to class discussion in both courses. He demonstrated a complete command of the materials and an exceptional ability to spot the factual nuances that matter in resolving each legal issue (as well as clarity in explaining why those nuances matter.)

These attributes carried over to Zach's exams in both courses. His exams were beautifully organized and written, and again spotted every nuance that would bear upon the resolution of each issue. His exam in Criminal Justice was the second-best of the 36 in the class, and missed by a tiny fraction scoring the one A+ we're allowed to give. His Evidence exam indeed was the best of the 123 in that class, and this time he did receive the A+. Many of the top students in the Classes of 2023 and 2024 were in this class, and Zach outscored them all.

Zach is an energetic student with a genuine interest in how the law develops. He was a frequent visitor during office hours, not to clarify his understanding of what we had covered (he didn't need clarification), but rather to explore issues that spun off those we studied. I enjoyed these interactions and learned much from our exchanges.

Zach has an engaging personality. He is fun to talk to, has a good sense of humor, and is enthusiastic about all aspects of the law. He would be a delight to work with for all in chambers.

Zach is determined to pursue a career of public service. His primary interest is in protecting and advancing the rights of workers. He hopes to work either in the Department of Justice or the Department of Labor to pursue these goals. His commitment is so strong that he passed up the opportunity to interview private law firms in our OCI week, and participated instead only in the week devoted to interviews with government agencies.

In sum, I think Zach possesses all the attributes that would make him an invaluable judicial law clerk.

Sincerely,

Michael Gottesman
Reynolds Family Endowed Service Professor

Michael Gottesman - gottesma@law.georgetown.edu - 202-662-9482

From: Zachary Semple, Legal Intern
 To: Marcia Bove, Senior Trial Attorney
 Date: August 1, 2022
 Subject: Knowing Participation Liability Under ERISA

Questions Presented

- I. How willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach in the context of a knowing participation claim?
- II. When have courts assigned constructive knowledge to defendants in knowing participation cases?
- III. What knowledge must a defendant possess to be liable as a knowing participant in a fiduciary breach?
- IV. What remedies are available against a knowing participant?

Brief Answer

- I. Circuit and district courts have accepted circumstantial evidence to establish a knowing participant's knowledge in a variety of situations. The few district court opinions that have viewed circumstantial evidence as insufficient have likely done so because of the facts of those specific cases, as opposed to an aversion towards circumstantial evidence generally.
- II. Courts rarely assign constructive knowledge to defendants in knowing participation cases. In one case the court found a corporation had constructive knowledge of the circumstances that rendered the transaction unlawful where the corporation's owners admitted to having knowledge of the circumstances. Otherwise, courts have either left questions of constructive knowledge to be determined during a bench trial or ruled that the defendant possessed "actual or constructive knowledge" without clarifying as to whether the knowledge was "actual" or "constructive."
- III. Courts are split on whether a knowing participant must merely possess information related to the underlying circumstances of the fiduciary breach, whether the knowing participant must be aware that the action taken in fact amounts to a fiduciary breach, or whether the knowing participant must be aware the action taken violated ERISA.
- IV. All remedies traditionally available in equity may be pursued by plaintiffs against a knowing participant. There remains disagreement among the circuit and district courts as to whether tracing requirements attach to claims seeking restitution and disgorgement against knowing participants.

Background

In its decision in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, the Supreme Court ruled a plan participant, beneficiary, or fiduciary can bring an action under the Employee Retirement Income Security Act (ERISA) of 1974, § 502(a)(3), 29 U.S.C. 1132(a)(1) against a party for knowingly participating in a prohibited transaction as defined by ERISA §

406(a), 29 U.S.C. § 1106 even if they themselves are not fiduciaries to the plan. *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238, 251 (2000). The Secretary of the Department of Labor can bring the same claim under ERISA § 502(a)(5), 29 U.S.C. 1132(a)(2). *Harris Trust* further ruled that the nonfiduciary must have “actual or constructive knowledge of the circumstances that render the transaction unlawful” for knowing participation liability to attach. *Harris Trust*, 530 U.S. at 251. *Harris Trust* reversed dictum from a previous decision, *Mertens v. Hewitt Associates*, stating that ERISA does not create a cause of action against a nonfiduciary for knowing participation in a fiduciary breach. 508 U.S. 248, 253-54 (1993). While defendants accused of knowing participation continue to cite *Mertens* for the proposition that ERISA does not establish liability against parties that are not fiduciaries for knowing participation in breach of a fiduciary duty, this reliance appears misplaced, as circuit courts almost universally have recognized a cause of action for knowing participation in a breach of fiduciary duty in the wake of *Harris Trust*’s recognition of knowing participating liability for prohibited transactions. *See, e.g., Martinez v. Sun Life Assurance Company of Canada*, 948 F.3d 62, 72 n.9 (1st Cir. 2020). However, significant confusion remains regarding four critical issues: (1) how willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach; (2) when have courts assigned constructive knowledge to knowing participants; (3) what knowledge must a defendant possess to be liable for participation in a fiduciary breach; (4) what remedies are available against a knowing participant?

Discussion

I. How willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach?

Since *Harris Trust*, courts have shown a general willingness to admit circumstantial evidence to prove a defendant’s actual or constructive knowledge for purposes of § 502(a) liability. Actual knowledge may be inferred from circumstantial evidence. *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 779 (2020). However, the discussion of circumstantial evidence in *Sulyma* related to actual knowledge in the context of the statute of limitations under ERISA § 413, 29 U.S.C.A. § 1113, not knowing participation liability. Furthermore, it did not specifically address the use of circumstantial evidence to prove constructive knowledge. Within the knowing participation context, at least two circuits and one district court have considered circumstantial evidence post-*Harris Trust*. *See Carlson v. Principal Financial Group*, 320 F.3d 301, 308 (2d Cir. 2003) (reversing lower court’s dismissal of complaint and noting defendant’s failure to mail a certificate required by 29 C.F.R. § 4041.28(d)(1) might support an inference of constructive knowledge of fiduciary breach); *Walsh v. Vinoskey*, 19 F.4th 672, 675-76 (4th Cir. 2021) (granting summary judgement based on four indicia of circumstantial evidence establishing that defendant had actual knowledge stock was overvalued); *Acosta v. Saakvitne*, 355 F. Supp. 3d 908, 924-25 (D. Haw. 2019) (recognizing as sufficient to defeat a motion to dismiss allegations that defendants were aware of company’s erroneous stock valuation but attempted to sell stock at unrealistically high price regardless). Further, at least one circuit used circumstantial evidence to prove a defendant’s knowing participation in a fiduciary breach prior

to the Supreme Court recognizing knowing participation liability in *Harris Trust. Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (finding a non-fiduciary's knowledge of a fiduciary's breach may be inferred from circumstances raising a reasonable inference of knowledge). Since *Harris Trust*, the Eastern District of Tennessee has recognized *Brock* as good law. *Chao v. Johnston*, No. 1:06-CV-226, 1:06-CV-227, 2007 WL 2847548 at *6 (E.D. Tenn. July 9, 2007) (noting plaintiffs raised sufficient circumstantial evidence at the pleading stage to support an inference of knowing participation and defeat a motion to dismiss).

In perhaps the most exhaustive analysis of circumstantial evidence in a knowing participation case, the Fourth Circuit in *Vinoskey* upheld the district court's summary judgement grant to plaintiffs based on four facts that, in the court's view, supported a reasonable inference that a CEO knowingly participated in a prohibited transaction because he knew the stock price was inflated. *Id.* at 678. First, the CEO reviewed the appraisal behind the inflated share price and the company's financials before accepting the stock offer in the challenged transaction. *Id.* Second, he knew the share price had recently been almost 75% lower than the proposed share price the Employee Stock Ownership Plan (ESOP) would pay. *Id.* Third, the CEO had regularly reviewed the company's financials. *Id.* Fourth, the CEO knew selling his shares to the ESOP would not cause him to lose all control of the company. *Id.* Relying on these facts, the Fourth Circuit affirmed the district court's summary judgment against defendant for his knowing participation in a prohibited transaction. *Id.*

In contrast, other district courts have ruled against plaintiffs whose cases were largely reliant on circumstantial evidence, although these outcomes are likely not indicative of a broader aversion to the use of circumstantial evidence in knowing participation cases. *See, e.g., Eslava v. Gulf Telephone Company*, No. 04-0297-KD-B, 2007 WL 9717348 at *4 (S.D. Ala. June 13, 2007) (ruling circumstantial evidence of appraiser's conflict of interest insufficient to defeat defendant's motion for summary judgement where circumstantial evidence indicated appraiser employed by ESOP to determine value of stock had previously worked for owner of the stock); *Scalia v. Reliance Trust Co.*, No. 17-cv-4540, 2021 WL 795270 at *37 (D. Minn. Mar. 2, 2021) (noting that analysis of whether defendants were knowing participants in a prohibited transaction was a "fact intensive inquiry" that precluded granting of summary judgement based on circumstantial evidence). Critically, no courts have categorically repudiated the use of circumstantial evidence to establish a defendant's knowing participation at the summary judgement stage.

Finally, district courts in the Eighth Circuit have reached opposite conclusions. *Compare Perez v. Mueller*, No. 13-C-1302, 2014 WL 2050606 at *3 (E.D. Wis. May 19, 2014) (indicating court's willingness to infer facts sufficient to defeat a motion to dismiss from a threadbare recitation of the elements of a cause of action in a complaint against a knowing participant where the alleged knowing participants owned the trust into which money made from a breach of fiduciary duty was funneled), *with Wilson v. Pye*, No. 85 C 6341, 1988 WL 1404, at *2 (N.D. Ill. Jan. 6, 1988) (ruling mere allegation that defendant bank permitted plan trustee to defalcate funds from Plan account insufficient to defeat motion to dismiss). These differing

rulings are likely caused by the fact-specific nature of each claim, and the comparative strength of each pleading.

II. When have courts assigned constructive knowledge sufficient to establish knowing participation liability?

Courts have assigned constructive knowledge to defendants in knowing participation cases; however they have done so only infrequently. *Harris Trust* established constructive knowledge as sufficient to implicate knowing participation liability. 530 U.S. at 250. Constructive knowledge is knowledge that a person using reasonable care or diligence should have, and is therefore attributed by law to the person. *Constructive Knowledge*, *Black's Law Dictionary* (9th ed. 2009). Generally, courts will find that defendants had “actual or constructive knowledge” when ruling on knowing participation liability without explicitly assigning constructive knowledge to a defendant. However, a few courts have specifically addressed the issue. The Second Circuit noted a nonfiduciary might have constructive knowledge sufficient to impose knowing participation liability where the nonfiduciary allegedly failed to send a certificate outlining its obligations to a beneficiary, as required by 29 C.F.R. § 4041.28(d)(1). *Carlson v. Principal Financial Group*, 320 F.3d 301, 308 (2d Cir. 2003). Another court permitted the question of constructive knowledge to reach the bench trial stage. *Iron Workers Local No. 60 Annuity Pension Fund by Robb v. Solvay Iron Works, Inc.*, No. 5:15-cv-54 (BKS/DEP), 2018 WL 2185510 at *13 (N.D.N.Y. May 11, 2018). In *Iron Workers Local No. 60*, a board member was alleged to have received monthly updates during board meetings that included information on the circumstances that rendered a transaction between the board member and a plan unlawful. *Id.* The court concluded that if the information had in fact been presented during those meetings, the defendant had at least constructive knowledge sufficient to implicate knowing participation liability. *Id.* In another instance, the Northern District of New York held a corporation had constructive knowledge of the circumstances that rendered the transaction unlawful where both of the corporation’s owners admitted to knowledge of the circumstances.¹ *Mintjal v. Professional Benefit Trust*, 146 F. Supp. 3d 981, 997 (N.D. Ill. 2015). Besides the decision in *Mintjal*, no court has ruled a defendant had constructive knowledge alone, instead ruling ambiguously that defendants had “actual or constructive knowledge.” Courts may be hesitant to impose constructive knowledge upon knowing participants because unlike fiduciaries, nonfiduciary knowing participants do not have any duties explicitly imposed upon them by ERISA.

III. What knowledge must a knowing participant possess?

The district and circuit courts have adopted three different approaches to the level of knowledge a knowing participating must possess to satisfy the knowledge requirement of a knowing participation claim. Some courts rule that the defendants merely must be aware of the factual circumstances underlying a transaction, but not the legal significance of those

¹ Here, the court appears to have conflated the doctrine of constructive knowledge with the doctrine of collective knowledge, which holds that “collective knowledge of all employees and agents within (and acting on behalf of) the corporation,” may be imputed to the corporation itself. *United States v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 1, 1575 (D.D.C. 2006). Collective knowledge likely is another tool available for plaintiffs to establish knowing participation of a corporation.

circumstances. *Haley v. Teachers Ins. and Annuity Assoc. of America*, 377 F. Supp. 3d 250, 260 (S.D.N.Y. 2019); see *Neil v. Zell*, 753 F. Supp. 2d 724, 731 (N.D. Ill. 2010) (interpreting *Harris Trust* to mean that fiduciary and non-fiduciary defendants need only “actual or constructive knowledge of the deal's details”); *Vinoskey*, 19 F.4th 672, 677 (4th Cir. 2021) (knowing participant need not know the transaction is unlawful but must have more than general knowledge of the transaction’s circumstances). In the context of knowing participation in a prohibited transaction under § 406(a), the Southern District of New York provided six elements a plaintiff must plead to survive a motion to dismiss a knowing participation claim: 1) the fiduciary caused the plan to engage in a prohibited transaction as defined by § 406; 2) based on the factual circumstances of the transaction, a § 408 exemption did not clearly apply; 3) in causing the transaction, the fiduciary knew or should have known the factual circumstances underlying the transaction that satisfied § 406; 4) the non-fiduciary knew that the transferor was an ERISA fiduciary; 5) the non-fiduciary knew that the fiduciary caused the transaction and had knowledge of the underlying facts that brought the transaction within § 406; and 6) the non-fiduciary knew or should have known the factual circumstances underlying the transaction that satisfied § 406. *Haley*, 377 F. Supp. 3d at 265-66. These elements as enunciated by *Haley* do not require knowledge of ERISA, or any legal conclusions. *Haley* concluded the plaintiff pled sufficient facts to defeat a motion to dismiss where it alleged the knowing participant knew it was transacting with an ERISA fiduciary, and that both the knowing participant and the fiduciary knew a loan program involved the indirect lending of money between the Plan and plan participants. *Id.* at 267.

However, other courts have imposed a higher burden of proof upon plaintiffs. Specifically, they have held the knowing participant must be aware the fiduciary’s actions violated a fiduciary duty. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 282-83 (2d Cir. 1992); see *Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Management*, 131 F. Supp. 3d 103, 131 (S.D.N.Y. 2015); *L.I. Head Start Child Development Services v. Frank*, 165 F. Supp. 2d 367, 371 (E.D.N.Y. 2001) (quoting *Liss v. Smith*, 991 F. Supp. 278, 305 (S.D.N.Y. 1998)). In *Ivy Asset Management*, the court outlined the two elements of knowing participation liability: (1) knowledge of the primary violator's status as a fiduciary; and (2) knowledge that the primary's conduct contravenes a fiduciary duty. 131 F. Supp. 3d at 131 (quoting *Gruby v. Brady*, 838 F. Supp. 820, 835 (S.D.N.Y. 1993)).

At least two district courts have applied an even more stringent standard, ruling the defendant must be aware the transaction they are participating in violates ERISA. See *Teets v. Great-West Life & Annuity Insurance Co.* 286 F. Supp. 3d 1192, 1208 (D. Colo. 2017); *Rozo v. Principal Life Insurance Co.*, 344 F. Supp. 3d 1025, 1037 (S.D. Iowa 2018). However, the circuit court in both *Teets* and *Rozo* did not specifically address this issue. Additionally, the Eastern District of Pennsylvania provided a more nebulous standard when it held the plaintiff must show defendant had actual or constructive knowledge that “some claim exists,” which could include the opinions of experts, knowledge the transaction would be harmful, or actual harm. *Spear v. Fenkell*, No. 13-2391, 2016 WL 5661720 at *31 (E.D. Pa. Sept. 30, 2016) (quoting *Gluck v. Unisys Corp.*, 960 F.3d 1168, 1177 (3d Cir. 1992)). Given that *Gluck* concluded by noting in the ERISA

context, “some claim exists” means actual knowledge of a breach of fiduciary duty, *Spear* likely aligns with cases requiring knowledge the fiduciary’s conduct violates a fiduciary duty.

In bringing a claim against a knowing participant, a plaintiff must be prepared to respond to language in *Harris Trust* that implies a higher standard of knowledge for knowing participants than fiduciaries. Specifically, while a fiduciary is liable for a prohibited transaction if they are aware of “facts satisfying the elements of a 29 U.S.C. § 1106(a) transaction,” *Harris Trust* requires a knowing participant to have actual or constructive knowledge of “the circumstances that rendered the transaction unlawful.” *Teets*, 286 F. Supp. 3d at 1208 (quoting *Harris Trust*, 530 U.S. at 251). *Teets* found compelling the argument that the Supreme Court’s use in *Harris Trust* of different language than that of fiduciary liability points to a higher knowledge requirement for knowing participation than fiduciary liability. *Id.* Furthermore, *Harris Trust* warned against requiring a counterparty to transactions with a plan to monitor the plan for compliance with ERISA, indicating a hesitance to impose significant compliance requirements upon non-fiduciaries. *Harris Trust*, 530 U.S. at 252. However, at least one case brought by the Secretary of Labor appears to have fully rebutted the knowledge requirement as understood in *Teets*. See *Vinoskey*, 19 F.4th 677-78 (4th Cir. 2021). There, the Secretary emphasized 1) the plain language of *Harris Trust* requires only knowledge of the facts that render a transaction unlawful; 2) the *Harris Trust* opinion makes no mention of knowledge of the law as a necessary element of knowing participation liability; 3) had *Harris Trust* intended to impose such a requirement, it would have done so with clear language. Brief of Appellee at 44, *Vinoskey*, 19 F.4th at 677-78 (4th Cir. 2021).

IV. What remedies are available against a knowing participant?

Plaintiffs may seek equitable remedies against nonfiduciary knowing participants. The Supreme Court first limited the universe of possible remedies available against non-fiduciaries who participate in a fiduciary breach in *Mertens*. There, it held Congress intended to revive the distinction between legal and equitable remedies in ERISA § 502(a). *Mertens*, 508 U.S. at 254-55. It concluded that § 502(a)(5) permits plaintiffs to seek against knowing participants only remedies that were traditionally considered equitable as opposed to remedies traditionally considered legal, such as compensatory damages. *Id.* at 260. After *Mertens*, the Supreme Court further elaborated on the availability of equitable remedies against knowing participants in *Harris Trust*, when it noted that § 502(a)(3) authorizes “an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person’s profits derived therefrom.” 530 U.S. at 250. The types of remedy available to plaintiffs against knowing participants are therefore more restricted than remedies available against fiduciaries. Compare *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) (holding a plaintiff may pursue as a remedy against a fiduciary monetary compensation for a loss resulting from the trustee’s breach of duty) with *Mertens*, 508 U.S. at 255-56 (ruling plaintiffs could not seek “monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties” against a knowing participant).

While courts now almost universally permit equitable remedies for knowing participation claims, confusion remains as to whether tracing requirements attach to restitution and

disgorgement in the knowing participation context. A tracing requirement imposes upon plaintiffs a requirement that they identify a fund apart from the knowing participant's general assets that was received in connection with participation in the breach of fiduciary duty. *Great West Life & Annuity Ins. Co v. Knudson*, 534 U.S. 204, 213 (2002). Traditionally, tracing requirements have not attached to disgorgement where the party possessing the wrongfully obtained property is a "conscious wrongdoer." *Id.* at 214, (citing *Restatement of Restitution* § 215, Comment a (1937)). Conscious wrongdoing occurs "when a person interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights." *Restatement (Third) of Restitution* § 3 (2019). This conscious wrongdoer exception to tracing requirements may have implications for the level of knowledge a plaintiff alleges against a knowing participant. Specifically, if the plaintiff alleges merely that a knowing participant to a prohibited transaction had actual or constructive knowledge of the "deals details," as per *Zell*, then tracing requirements may attach, because the plaintiff might struggle to establish the knowing participant acted in "conscious disregard of the other's rights." *See generally, Zell*, 753 F. Supp. 2d at 731. However, if the plaintiff argues the defendant knew or should have known the fiduciary's actions violated ERISA, as in *Teets*, then tracing requirements should not attach, because the knowing participant was aware they participated in a violation of ERISA and therefore acted as a conscious wrongdoer. *See generally, Teets*, 286 F. Supp. 3d at 1208.

Unfortunately, the Tenth Circuit in *Teets v. Great-West Life & Annuity Ins. Co.* reached the opposite conclusion, attaching a tracing requirement to restitution, accounting and disgorgement, even though the district court required a showing that the defendant had actual or constructive knowledge that the fiduciary's action violated ERISA. 921 F.3d 1200, 1225 (10th Cir. 2019). The Ninth Circuit echoed this position when it ruled the plaintiff had failed to state a claim for equitable relief because the plaintiff could not identify a specific fund from which they sought recovery. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 664 (9th Cir. 2019). Alternatively, many district courts have acknowledged there is no tracing requirement for knowing participation claims. *See e.g. Spear v. Fenkell*, No. CV 13-2391, 2016 WL 5561720 at *33 (E.D. Pa. Sept. 30, 2016); *In re Beacon Associates Litig.*, 818 F. Supp. 2d 697, 708 (S.D.N.Y. 2011). Until the Supreme Court provides more explicit guidance on the issue, courts may continue to reach conflicting rulings.

Additionally, the most recent ruling from the Supreme Court on equitable remedies may have ramifications for disgorgement as a remedy in the knowing participation context. In *Liu v. SEC*, the Court highlighted significant limiting principles for disgorgement. 140 S. Ct. 1936 (2020). Perhaps most crucially, the Court noted disgorgement is limited to the "net" profits, or the "gain made upon any business or investment, when both the receipts and payments are taken into the account." *Liu*, 140 S. Ct. at 1945. This focus on net profits requires courts to deduct "legitimate business expenses" incurred by the business from the disgorgement amount, although certain business expenses may be wholly fraudulent. *Id.* at 1950. While no courts have yet ruled on the applicability of this limiting principle to disgorgement in the ERISA context, *Liu* noted its guidance on disgorgement is broadly applicable to disgorgement as a remedy for other statutes. *Id.* at 1944. Perhaps in anticipation of the decision in *Liu*, Congress amended the Securities

Exchange Act of 1934 to enshrine disgorgement as an available remedy through passage of the National Defense Authorization Act for Fiscal Year 2021 (NDAA). National Defense Authorization Act for Fiscal Year 2021, § 15 U.S.C. 78u(d) (2020). However, this amendment does not reject the limiting principles enunciated in *Liu*. § 78u(d). Furthermore, the language of § 78u(d) outlining the specific penalties the Security Exchange Commission may impose does not affect the common law doctrine of disgorgement, so the statute has no effect on disgorgement as a remedy under ERISA. Therefore, *Liu* may provide knowing participation defendants a novel argument to limit disgorgement remedies under ERISA.

Applicant Details

First Name **Shiva**
Middle Initial **Mich**
Last Name **Sethi**
Citizenship Status **U. S. Citizen**
Email Address shivasethi@gmail.com

Address

Address
Street
700 Constitution Avenue Northeast, Apt 118
City
Washington
State/Territory
District of Columbia
Zip
20002
Country
United States

Contact Phone Number **6463523810**

Applicant Education

BA/BS From **University of North Carolina-Chapel Hill**
Date of BA/BS **May 2017**
JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
Date of JD/LLB **May 19, 2024**
Class Rank **School does not rank**
Law Review/Journal **Yes**
Journal(s) **Georgetown Law Journal**
Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Foundation**

Recommenders

Shelanski, Howard
hshelanski@law.georgetown.edu
Rogers, Brishen
br553@georgetown.edu
2023346078

Gaston Pearce, Mark
mark.pearce@georgetown.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Shiva Michael Sethi

700 Constitution Ave NE, Apt 118 Washington D.C. 20002 • 646-352-3810 • sms524@georgetown.edu

The Honorable Jamar K. Walker
Walter East Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

June 12, 2023

Dear Judge Walker,

I am a rising third-year student at Georgetown Law pursuing a career as a trial litigator focused on labor and employment law. My strong record of public service and legal writing experience would enable me to contribute meaningfully to your chambers as a clerk.

For four years before law school, I wrote public comments on regulations, developed expertise on several federal public benefit programs, and crafted legislation with members of Congress while working at an anti-poverty nonprofit organization.

At Georgetown, I have continued to seek out opportunities to serve the public. As a member of the Black Law Students Association, I have volunteered to help D.C. residents access housing assistance. I have presented at a public interest conference at Morehouse College and worked for three federal agencies. Most recently, I represented indigent clients in housing discrimination and family law cases as a student attorney in Georgetown's Health Justice Alliance Clinic.

I have also honed my legal writing and research skills. This spring, I published an article in the *Georgetown Journal on Poverty Law and Policy*. As an Executive Articles Editor for the *Georgetown Law Journal*, I lead a team in providing above-the-line feedback on academic articles prior to publication.

I am particularly interested in clerking in your chambers because of your experience as an Assistant United States Attorney and your recent appointment to the bench. It would be a distinct honor to serve as one of your clerks at the beginning of your time on the bench.

I hope to apply the legal research, writing, and analysis skills that I have developed and to continue serving the public as a clerk in your chambers. Thank you for your consideration.

Shiva Michael Sethi
Candidate for Juris Doctor 2024